No. 11961

United States

Circuit Court of Appeals

for the Ninth Circuit

HAMILTON FOODS, INC., a corporation,
Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and JACK BELYEAR, doing business as Refrigerated Express Company,
Appellees,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Appellant,

vs.

HAMILTON FOODS, INC., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Typo Press, 398 Pacific, San Francisco 8-3-48—60

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District Court of the United States for the Southern District of California, Central Division

No. 6835-Y

HAMILTON FOODS, INC.

Plaintiff,

vs.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a Kansas corporation; JACK BELYEA, doing business as REFRIGERATED EXPRESS CO., DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Defendants.

COMPLAINT

(For Damages for Failure to Deliver Merchandise in Good Condition)

The plaintiff complains and for cause of action against the defendants, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, Doe One and Doe Two, alleges as follows:

I.

That the plaintiff is a corporation duly organized under the laws of the State of Illinois and having its principal place of business in the City of Chicago, County of Cook, State of Illinois; that the defendant, The Atchison, Topeka and Santa Fe Railway Company, is a corporation duly organized and existing under the laws of the State of Kansas, doing business in the State of California, and having its principal office in the City of Los

Angeles, California. That the defendant, Jack Belyea, is a resident of the City of Los Angeles, California, and was doing business at all times [2] herein mentioned under the fictitious firm name of "Refrigerated Express Company"; that the matter in controversy exceeds, exclusive of costs, the sum of $3,000.00, and the jurisdiction of the above entitled court is invoked on the grounds of diversity of citizenship.

II.

That the defendants Doe One, Doe Two, Doe Three and Doe Four are sued herein by such fictitious names for the reason that their true names and capacities are unknown to the plaintiff at this time. Plaintiff will ask leave of court to amend the Complaint and insert the true names and capacities when same are ascertained.

III.

That at all times herein mentioned the said defendant, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, was a common carrier engaged in the business of carrying merchandise in interstate commerce from, among other places, the City of Chicago, County of Cook, State of Illinois, to the City of Los Angeles, County of Los Angeles, State of California. That on or about April 1, 1946, the said defendant, The Atchison, Topeka and Santa Fe Railway Company, received of the plaintiff at the City of Chicago, County of Cook, State of Illinois, One Thousand (1000) cartons of frozen vegetables and shrimp in good con-

dition, the property of the plaintiff, to be, by defendant, transported to the City of Los Angeles, County of Los Angeles, State of California, and said defendant corporation issued a bill of lading to the plaintiff for said goods, in which said bill of lading the plaintiff's agent, Gouley-Burcham Co., was named as consignee, and the destination of said goods was given as the City of Los Angeles, State of California. The plaintiff alleges that at all times herein mentioned he was and now is the lawful holder of said bill of lading.

That it became the duty of the defendant corporation to [3] transport said goods to the plaintiff's agent at the City of Los Angeles, in the State of California, and it was the duty of the defendant corporation to keep said goods in a frozen condition at all times by the proper and sufficient use of ice and salt, and to re-ice and use additional salt, as necessary in order to deliver said goods to their destination in an adequately frozen condition, so that said goods would be merchantable and remain satisfactory for human consumption.

IV.

That it became the duty of the defendant corporation to transport said goods to the plantiff as aforesaid. However, in utter disregard of said duty in this behalf, the said corporation defendant failed and neglected to transport said goods so that they would arrive at their destination in a good and merchantable condition satisfactory for human consumption and failed to properly ice, salt and re-ice and add salt, as necessary.

V.

That by reason of the defendant corporation's failure and neglect of its said duty, 450 cartons of frozen vegetables and shrimp arrived at their destination in Los Angeles, California, in a poor condition; not adequately frozen and unfit for human consumption. That the reasonable value of said 450 cartons of frozen vegetables and shrimp is in the sum of $4,455.00 and, in addition thereto, the plaintiff was required to pay the sum of $294.75 for freight and was required to store said 450 cartons of goods until the disposition of this matter, at a cost to the plaintiff in the sum of $464.75. That by reason of the negligence and the breach of duty of said defendant corporation, as aforesaid, the plaintiff was damaged in the sum of $5214.50. [4]

For a separate and second cause of action against the defendant, Jack Belyea, doing business as Refrigerated Express Co., Doe Three and Doe Four, the plaintiff alleges as follows:

I.

Repeats and realleges each and every allegation contained in Paragraphs I and II of plaintiff's first cause of action as though set forth in full herein.

II.

That at all times herein mentioned, the said defendant, Jack Belyea, doing business as Refrigerated Express Co. was a contract carrier engaged in the business of carrying merchandise in intrastate commerce in the State of California. That

on or about April 9, 1946, the said defendant, Jack Belyea, received from the plaintiff at the City of Los Angeles, County of Los Angeles, State of California, approximately 450 cartons of frozen vegetables and shrimp, the property of the plaintiff, to be by said defendant transported in certain quantities to San Francisco, California, and to Bakersfield, California. That said defendant, Jack Belyea, was to deliver 60 cases to Bakersfield, California, and 390 cases to San Francisco, California. The plaintiff alleges that at all times herein mentioned, he was the owner of said merchandise.

III.

That it became the duty of said defendant, Jack Belyea, to transport said goods as aforementioned and it was the duty of the said defendant, Jack Belyea, to transport said goods in such a manner so as to keep said goods in a frozen condition at all times and so that said goods would arrive at their destination as aforesaid in an adequately frozen condition, merchantable and satisfactory for human consumption.

IV.

That in utter disregard of said duty as aforesaid, the said defendant, Jack Belyea, failed and neglected to transport said goods [5] so that they would arrive at their destination as aforesaid in a good and merchantable condition satisfactory for human consumption.

V.

That by reason of the defendant, Jack Belyea's failure and neglect of duty as aforesaid, the 450

cartons of frozen vegetables and shrimp arrived at their said destination in a poor condition not adequately frozen and unfit for human consumption. That the reasonable value of said 450 cartons of said frozen vegetables and shrimp is in the sum of $4,455.00, and, in addition thereto, the plaintiff was required to pay the sum of $294.75 for freight and was required to store said 450 cartons of goods until the disposition of this matter at a cost to the plaintiff in the sum of $464.75. That by reason of the negligence and the breach of duty of said defendant, Jack Belyea, as aforesaid, the plaintiff was damaged in the sum of $5214.50.

Wherefore plaintiff prays for judgment against the defendants and each of them in the sum of $5214.50, for costs of suit, and for such other and further relief as to the court may seem proper.

ALBERT H. ALLEN &
HYMAN GOLDMAN.

By HYMAN GOLDMAN.

(Verified.)

[Endorsed]: Filed April 21, 1947. [6]

[Title of District Court and Cause.]

ANSWER

Comes now The Atchison, Topeka and Santa Fe Railway Company, a corporation, hereinafter referred to as Santa Fe and for its answer to the

first cause of action pleaded in the complaint on file herein and answering for itself alone admits, denies and alleges as follows:

FIRST DEFENSE

I.

Answering Paragraph I, Santa Fe does not have any information or belief respecting the allegations as to plaintiff's organization and principal place of business or respecting defendant Jack Belyea's residence, place or manner of doing business, and on that ground denies said allegations. [8]

II.

Answering Paragraph II, Santa Fe does not have information or belief sufficient to enable it to answer the allegations of said paragraph II and on that ground denies said allegations.

III.

Answering Paragraph III, Santa Fe admits that it was and is a Kansas corporation, a common carrier of freight between Chicago, Illinois, and Los Angeles, California, admits that on April 1, 1946, it received from plaintiff at Chicago, Illinois, approximately one thousand cartons of vegetables and shrimp for transportation to Los Angeles, California, and that it issued a bill of lading therefor to plaintiff. Santa Fe denies each and every, all and singular, the allegations of said Paragraph III not heretofore expressly admitted.

IV.

Santa Fe denies each and every, all and singular, the allegations of Paragraphs IV and V; denies

that plaintiff was damaged in the sum of Five Thousand Two Hundred Fourteen Dollars and Fifty Cents ($,214.50) or in any sum or at all.

SECOND DEFENSE

I.

Santa Fe incorporates all the allegations set forth in its first defense and makes them a part hereof as if fully set forth herein.

II.

That Section 1(b) of the Terms and Conditions of the bill of lading referred to in complaint provides in part as follows: "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act or default of the shipper or owner, or for natural shrinkage." [9]

III.

That said cartons of vegetables and shrimp were improperly loaded by the plaintiff or its agents and employees so that said cartons could not be properly cooled during transit.

IV.

That the car in which said cartons were loaded arrived in Los Angeles April 9, 1946, and notice was given of such arrival on the same date, but plaintiff, its agents or employees failed to commence unloading said car until April 11, 1946.

V.

That the failure to properly load said cartons of vegetables and shrimp and to promptly unload said

cartons was the cause of the loss or damage, if any, suffered by the plaintiff; that the loss or damage, if any, suffered by plaintiff was caused by the act or default of the shipper or owner.

THIRD DEFENSE

I.

Defendant incorporates all allegations set forth in its first defense and makes them a part hereof as if fully set forth herein.

II.

Section 1(b) of the Terms and Conditions of said bill of lading referred to in the complaint provides in part as follows: "Except in case of negligence of the carrier . . . the carrier or party in possession shall not be liable for loss, damage or delay . . . resulting from a defect or vice in the property . . ."

III.

Santa Fe denies that the loss or damage, if any, suffered by the plaintiff was caused by its negligence and alleges that the loss or damage, if any, suffered by plaintiff was caused by a defect or vice in the property in that said [10] cartons and contents could not safely withstand and undergo transportation from Chicago to Los Angeles by railroad refrigerator cars without loss or damage occurring thereto, if, in fact, any such loss or damage did occur.

Wherefore, Santa Fe prays that plaintiff take nothing by its complaint on file herein and that it

be awarded its costs and disbursements herein incurred and such other and further relief as to the court may seem just and proper in the premises.

LEO E. SIEVERT,
J. H. CUMMINS,
Attorneys for Defendant, The Atchison, Topeka and Santa Fe Railway Company.

(Affidavit of Service by Mail.)

[Endorsed]: Filed May 12, 1947 [11]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Jack Belyea, sued herein as Jack Belyea, doing business as Refrigerated Express Company, and answers the complaint on file herein as follows:

I.

Answering Paragraph I of plaintiff's second cause of action, and directing said answer to incorporated Paragraph I of plaintiff's first cause of action, denies that he is a resident of the City of Los Angeles, California, but alleges that he is a resident of the City of El Monte, California.

II.

Answering Paragraph II of plaintiff's second cause of action, this answering defendant admits each and every allegation therein contained except that he received the shipment therein mentioned from the defendant, The Atchison, Topeka and

Santa Fe Railway Company, [12] and that part of the shipment was to go to Sacramento, Calif.

III.

Answering Paragraph IV of plaintiff's second cause of action, this answering defendant denies both generally and specially each and every allegation therein contained, but in this connection alleges that when the shipment of merchandise mentioned in the complaint was received by defendant, The Atchison, Topeka and Santa Fe Railway Company, and to be taken for further shipment by this answering defendant, the merchandise was in bad condition.

IV.

Answering Paragraph V of plaintiff's second cause of action, this answering defendant denies both generally and specially each and every allegation therein contained, and denies that the plaintiff was damaged in the sum of $5214.50, or in any sum at all.

FIRST AFFIRMATIVE DEFENSE

I.

That on or about the 19th day of May, 1947, the defendant, Jack L. Belyea, was duly adjudicated a bankrupt under the Acts of Congress relating to bankruptcy by an order duly made and entered in the District Court of the United States, Central Division, Southern District of California, and the defendant having complied with all of the requirements of the law in that respect, it was thereafter ordered by said Court by an order duly made and entered therein that this defendant be discharged

from all debts and claims provable by said Acts against his estate, and which existed on or about the 19th day of May, 1947, on which day the petition for adjudication was filed by the bankrupt, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

II.

That the debt, which is the basis of plaintiff's suit herein, was due and owing to plaintiff on and prior to the date that this [13] defendant was adjudicated a bankrupt and was included in the schedule of debts annexed to said petition in bankruptcy, and is a debt provable against the bankruptcy estate of this defendant, and one from which a discharge in bankruptcy is a release under said bankruptcy acts.

III.

That on or about the 24th day of July, 1947, this defendant received a discharge in bankruptcy from the District Court of the United States, Southern District of California, Central Division, Case No. 44,985-Y.

Wherefore, this answering defendant prays that plaintiff take nothing by its complaint, and that he may be hence dismissed with his costs, and for such other and further relief as to the court may seem meet and proper in the premises.

/s/ LEO K. GOLD,
Attorney for Answering
Defendant, Jack Belyea.

(Verified.)

[Endorsed]: Filed Nov. 18, 1947. [14]

REPORTER'S TRANSCRIPT OF OPINION OF THE COURT

Los Angeles, California, Tuesday, March 16, 1948.

Honorable Charles C. Cavanah, Judge, presiding.

In the case of Hamilton Foods Incorporated against the Atchison, Topeka & Santa Fe Railway Company, Case No. 6835, the court has reached the conclusion that the principles of law applicable are, first, that where damages are claimed by reason of loss or of injury to property entrusted to a common carrier for transportation, the burden rests upon the plaintiff to establish by a preponderance of the evidence the delivery of the property to the carrier, and where the action is founded upon negligence the burden rests upon the plaintiff to show that the shipment was delivered to the carrier in good condition or order.

When the plaintiff has made out a prima facie case of liability the burden then rests upon the carrier to rebut that prima facie case [21-B]

When proof is given by the plaintiff that property delivered to a common carrier in good condition was damaged while in the hands of the carrier, a presumption arises that the damage was due to the negligence of the common carrier and the burden of proof is upon that carrier to show that it was free from negligence, or that notwithstanding its negligence the damage occurred without its fault—that is, the negligence did not contribute to the damage.

The rule of perishable protective tariff approved by the Interstate Commerce Commission is that if goods arrive at the place of delivery in bad condition, which was caused by lack of ordinary care on the part of the carrier, it is liable. But a compliance with it is a defense against a charge of negligence. In other words, the measure of duty of the carrier was to use reasonable, ordinary diligence.

Under the protective tariff application to shippers of perishable properties, it must show that there was a lack of ordinary care on the part of the carrier. The carrier is not an insurer.

The only negligence in this case was that 40 cases of the shipment arrived in a damaged condition. The bill of lading applicable here provides that they must use 13,000 pounds of ice and 30 per cent of that amount in salt in the car in which the goods were shipped.

Now, when the car arrived here for delivery the plaintiffs were notified of its arrival. The plaintiffs sent an agent there to receive the delivery, said agent being a local concern in Los Angeles who had refrigerated truck equipment. This party arrived at the car. He opened the door of the car. He then closed it and went and got a thermometer. He says he placed it in the end of the car and that the temperature was 54 degrees. He then placed the thermometer under the cases involved which contained the shrimp creole, and the thermometer registered 50 degrees. [21-C]

He removed 550 cases and disposed of them in

this city and no complaint was made as to their damage. In other words, they were in good condition.

The remaining 450 cases, 40 of which were described as being damaged and of which they made a physical examination, the witness said he stuck his finger through the cases and into the shrimp and they were soft.

He then stated that he took the remaining 410 cases in his refrigerator truck and conveyed them to San Francisco and there they discovered they were in bad or damaged condition.

Now, the court is called upon to reason out these circumstances. Did the shipper's own act when its agent went to this car and opened it up and closed it and then went and got a thermometer and came back and opened the car up again, did that expose this shipment to such condition that it no doubt brought about the damage to the remaining 410 cases? Also transporting it from Los Angeles to San Francisco—did those acts of the shipper after receiving the goods at the car, broke the seal, received the merchandise, went in and took possession and the handling of this shipment was the real cause of the damage.

I feel that the railroad company has complied with the tariff protective regulations and the bill of lading under which it was governed in delivering this shipment on its track here in Los Angeles. The evidence shows that only 25 to 40 cases were really in a damaged condition. As to the rest, the shipper relied upon his thermometer that he placed

in the car, opening the door and exposing this shipment which the witnesses all testified as soon as the doors were opened a gush of cold air come out of the car, which is natural.

You cannot say that after the shipper took possession of this car, that when the shipment arrived in San Francisco, [21-D] from the time the shipper took possession of the car, nothing occurred to place the merchandise in a damaged condition.

As I say, only 40 cases were discovered to be in a damaged condition, and at $9.90 a case that would be $396.00 plus the freight on those 40 cases, so the court has reached the conclusion that the plaintiff can recover $396.00 plus the freight on those 40 cases against the defendant, and costs.

Findings and decree will be prepared by the plaintiff according to the views expressed.

[Endorsed]: Filed June 15, 1948. [21-C]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on March 9, 1948, Albert H. Allen and Hyman Goldman, by Albert H. Allen, appearing as attorneys for plaintiff, and Leo E. Sievert, Louis M. Welsh, Frederic A. Jacobus and J. H. Cummins, by Louis M. Welsh, appearing as attorneys for defendant, The Atchison, Topeka and Santa Fe Railway Company, and

Jack Belyea, doing business as Refrigerated Express Company, defendant, appearing by Leo K. Gold, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, the Court finds the facts as follows: [22]

FINDINGS OF FACT

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal place of business in the City of Chicago, County of Cook and State of Illinois; that the defendant, The Atchison, Topeka and Santa Fe Railway Company, for brevity referred to as Santa Fe, is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and having its principal office and place of business in California, in the City of Los Angeles, County of Los Angeles and State of California; that the defendant, Jack Belyea, doing business as Refrigerated Express Company, is a resident of the City of El Monte, County of Los Angeles, State of California.

2. That the amount in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, and the Court has jurisdiction by reason of diversity of citizenship.

3. That the Santa Fe is a common carrier and is engaged in handling merchandise in interstate commerce and is subject to the rules and regulations of the Interstate Commerce Commission and

subject to the protective tariffs approved by said Commission and in force on April 1, 1946; that the defendant, Jack Belyea, doing business as Refrigerated Express Company, likewise is a common carrier subject to the same rules and regulations.

4. That on April 1, 1946, the plaintiff, Hamilton Foods, Inc., through its agent, Fulton Market Cold Storage Company of Chicago, Illinois, for brevity referred to as Fulton, delivered to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for shipment to Los Angeles via Chicago, Milwaukee, St. Paul and Pacific Railroad and the Santa Fe, by refrigerated car to Los Angeles, one thousand (1000) cartons of frozen shrimp creole, which said frozen shrimp creole was packed approximately twenty-five pounds to the carton; each carton contained small packages weighing [23] approximately fourteen (14) ounces each; that said merchandise was delivered to the railroad carriers in a good and frozen condition, said merchandise at that time being frozen at a temperature of fifteen (15) degrees to twenty (20) degrees below zero; that car No. ERDX 2667, in which said merchandise was placed, subsequent to delivery, was under the control of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company from Chicago to Kansas City and thereafter said car was under the control of the defendant, Santa Fe, from Kansas City to Los Angeles; that said car was precooled prior to the merchandise being loaded, having been emptied of frozen poultry which arrived

in a good and frozen condition just shortly prior to the loading of the merchandise in said car.

5. That prior to the delivery of the merchandise to Fulton in Chicago, Illinois, the plaintiff prepared its product by cooking the shrimp and adding cooked vegetables and then immediately freezing it in their plant to a temperature of twenty degrees below zero, where it was kept in such frozen condition until delivery to Fulton; that Fulton kept the merchandise in its refrigerated storage plant at a temperature of twenty degrees below zero.

6. That the shipping instructions provided that the merchandise was to go by Chicago, Milwaukee, St. Paul and Pacific Railroad to Kansas City and from Kansas City by Santa Fe and the shipping instructions contained the following instructions:

> "Insure icing to capacity 13,000 lbs. crushed ice and 3900 lbs. salt re-ice to capacity, crushed ice 30% salt at all regular icing stations and oftener if delayed;"

that these instructions were proper and adequate for the shipping of the frozen shrimp creole and the instructions usually given for the shipping of frozen foods.

7. That the loading of the car commenced at 1:00 p.m. on April 1, 1946 and the car was iced to capacity with 13,000 lbs. [24] of ice and 3900 lbs. of salt by the Chicago, Milwaukee, St. Paul and Pacific Railroad at 2:00 p.m.; that the loading was completed at 3:00 p.m. on the same day, and

that prior to the car being sealed there was added 1000 lbs. of dry ice which was placed in the car on top of the merchandise; that the car left Chicago on April 2, 1946 at 11:30 a.m.

8. That the merchandise was delivered to the carriers in good and frozen condition and left Chicago in good and frozen condition.

9. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company issued to the plaintiff a bill of lading consigned to plaintiff care of Gouley-Burcham Co., at Los Angeles, California, plaintiff's Exhibit 5, which was the contract between the parties; that the merchandise was the property of the plaintiff and the plaintiff is the proper party to bring this action.

10. That by stipulation it was established that the car was iced as follows:

	Ice	Salt	Date (1946)	Time
Chicago	13,000 lbs.	3,900 lbs.	April 1	2:15 p.m.
Savannah	3,000 lbs.	900 lbs.	April 2	5:00 p.m.
Kansas City	1,000 lbs.	300 lbs.	April 4	1:40 a.m.
Kansas City	1,000 lbs.	300 lbs.	April 4	2:05 p.m.
Waynoka	1,000 lbs.	450 lbs.	April 5	6:53 a.m.
Clovis	600 lbs.	180 lbs.	April 5	9:10 p.m.
Belen	600 lbs.	180 lbs.	April 6	11:35 a.m.
Winslow	900 lbs.	270 lbs.	April 7	8:45 a.m.
Needles	900 lbs.	270 lbs.	April 7	10:20 p.m.
San Bernardino	1,500 lbs.	450 lbs.	April 8	7:05 p.m.

which were regular icing stations, and that the car arrived at San Bernardino, California, at 7:05 p.m. on April 8, 1946, at which time 1500 pounds of ice and 450 pounds of salt were added.

11. That the car arrived in Los Angeles at 12:01 a.m. [25] on April 10, 1946 and was placed on the

Bay Street Perishable Team Track in Los Angeles at that time and was made available to the consignee at the Bay Street Perishable Team Track in Los Angeles on April 11, 1946.

12. That no ice or salt was placed in the car between the time the car left San Bernardino on April 8, 1946 and the time it was unloaded on April 11, 1946, at the Bay Street Perishable Team Track in Los Angeles, which said track is owned by and under the control, supervision and jurisdiction of Santa Fe.

13. That Los Angeles is a regular icing station.

14. That it was stipulated by and between the parties that the temperatures at the various cities through which the car passed, and on said dates, were as follows:

City	Date	Maximum Temperature	Minimum Temperature	Mean Temperature
Chicago	4-2-46	50	32	41
Kansas City	4-4-46	69	48	58
Waynoka	4-5-46	82	49	66
Clovis	4-5-56	76	55	66
Winslow	4-7-46	67	42	54
Needles	4-7-46	76	53	64
San Bernardino	4-8-46	62	47	54

That the temperatures in Los Angeles on April 9, 10 and 11, 1946, were as follows:

4- 9-46	68	47	58
4-10-46	85	51	68
4-11-46	88	62	75

15. That Belyea had made inquiry of defendant Santa Fe's agent as to the arrival of car ERDX 2667 and upon being advised that the car had arrived on the Bay Street Perishable Team Track of Santa Fe, the defendant Belyea signed the receipt,

plaintiff's Exhibit 6; that at the time the receipt was signed [26] the penciled notation did not appear on said exhibit, they having been added by defendant Santa Fe's agent without the knowledge of defendant Belyea or plaintiff.

16. That after signing the receipt, plaintiff's Exhibit 6, defendant Belyea broke the seals of the car and observed that there was no gush of cold air or vapor as usually appears when the temperature of a car is low. He further observed that the merchandise visible near the door was so soft and defrosted that his finger penetrated through the outer carton, the inner package and the merchandise itself; that said cartons so visibly soft numbered twenty-five to forty, and that thereupon he closed the door of the car and immediately called the defendant Santa Fe's agent and complained of the warmth of the car and requested a thermometer; that the defendant Santa Fe's agent did not have a thermometer and thereupon defendant Belyea walked a block, obtained a thermometer and returned with the thermometer to the car; that he opened the doors of the car and placed the thermometer in the rear of the car, closed the door and permitted the thermometer to remain there for fifteen minutes, after which time the thermometer was removed and it indicated a temperature of fifty-four (54) degrees; that thereupon he again placed the thermometer between the packages of shrimp creole, closed the door and again permitted the thermometer to remain in the car fifteen minutes, and thereupon removed the thermometer, at

which time the thermometer registered fifty degrees.

17. That the defendant Belyea thereupon called the representative of Pickin-Time Frozen Foods Company who were to receive five hundred and fifty (550) cases of the frozen shrimp creole, who observed that some cartons in the car were still hard and so the defendant Belyea hand-picked five hundred and fifty (550) hard cartons and delivered them to Pickin-Time Frozen Foods Company in Los Angeles, California; that there was a shortage of [27] frozen shrimp creole on the market; that Pickin-Time placed the cartons in its freezer, froze the cartons and disposed of the merchandise in the regular channels, in the regular course of trade.

18. That the defendant, Belyea, then attempted to find refrigerated space in Los Angeles for the balance of the merchandise which was to have been shipped to Bakersfield and San Francisco and called every refrigerated warehouse in Los Angeles and as far as Pomona without being able to find space for the shrimp creole; that thereupon the defendant, Belyea, placed the remaining four hundred and fifteen (415) cases of shrimp creole in his refrigerated truck and delivered the same in Bakersfield and San Francisco where the merchandise was rejected as having been spoiled.

19. That the defendant, Belyea, moved the merchandise in a refrigerated truck which had six inches of spun glass insulation on the sides and ceiling, six inches of cork in the floor; that his

truck was a modern truck and had a complete blower and refrigeration equipment, and that at the time the shrimp creole in question was shipped to Bakersfield and San Francisco there also was placed in the same truck frozen cauliflower and frozen broccoli which arrived in Bakersfield, Sacramento and San Francisco in a good and frozen condition and accepted by the consignees; that the shrimp creole was rejected in Bakersfield, Sacramento and San Francisco as being damaged; that the defendant Belyea's truck was capable of reducing the temperature of a commodity ten to fifteen degrees if the commodity was above twenty-five degrees when placed in the truck, and could maintain any temperature below twenty-five degrees.

20. That one of the consignees in Bakersfield who received fifty (50) cartons found the merchandise damaged but filed no claim because the merchandise had not been paid for by him and was still the property of the plaintiff. [28]

21. That each carton of frozen shrimp creole was valued at Nine Dollars and Ninety Cents ($9.90) and that it was stipulated between the parties and the Court finds that the fifty (50) cases which were received in Bakersfield and the Three Hundred and Sixty-Five (365) cases which were received in San Francisco, or a total of Four Hundred Fifteen (415) cartons, were received at Bakersfield and San Francisco in a damaged condition and was contaminated and was not fit for human consumption; that said merchandise was a total loss to the plaintiff, and that said loss totaled

Four Thousand One Hundred Eight and 50/100 Dollars ($4108.50) plus the loss of freight in the sum of Two Hundred Sixty Nine and 75/100 Dollars, ($269.75).

22. That it was the duty of the defendant, Santa Fe, to transport said goods to the plaintiff at Los Angeles in a good and merchantable condition, satisfactory for human consumption.

23. That the merchandise was shipped under the protective tariff, applicable to shippers of perishable merchandise.

24. That it is not true that the defendant Belyea was guilty of any negligence.

25. That the defendant Belyea received a discharge in bankruptcy in the U. S. District Court, Southern District of California.

From the foregoing findings of fact, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the plaintiff owed the burden of proving that the merchandise was shipped in a good and merchantable condition, and that the plaintiff established that burden of proof by a preponderance of the evidence.

2. That the plaintiff made out a prima facie case upon showing that the merchandise was properly shipped in good condition and that 40 cases arrived at Los Angeles in a damaged condition and that thereupon the [29] burden rested with the carrier to rebut the prima facie case made out by the plaintiff.

3. That when property delivered to a common carrier in good condition arrives at its destination in a damaged condition a presumption arises that the damage was due to the negligence of the common carrier and the burden of proof is upon the carrier to show that he was free from negligence, or that notwithstanding its negligence, the damage occurred without its fault, that is, the negligence of the carrier did not contribute to the damage.

4. That under the perishable protective tariff, approved by the Interstate Commerce Commission, if goods arrive at the place of delivery in damaged condition which was caused by the lack of ordinary care on the part of the carrier, the carrier is liable; but a compliance with the conditions of the perishable protective tariff approved by the Interstate Commerce Commission is a defense against any charge of negligence and the measure of the duty of the carrier is to use reasonable ordinary diligence.

5. That under the protective tariff applicable to shippers of perishable properties, the plaintiff must show that there was a lack of ordinary care on the part of the carrier as the carrier is not an insurer.

6. That where merchandise is shipped through one carrier and subsequently reshipped through another carrier, the plaintiff may maintain an action for damages against the carrier who has delivered the shipment of merchandise to the destination set forth in the bill of lading and such delivering carrier is responsible for the loss or damage

sustained by the shipper, even though the loss or damage occurred while the shipment was in possession of another carrier. If the loss or damage was sustained while the shipment was in possession of such other carrier, then the delivering carrier may recover the amount of such loss or damage from the carrier that caused the loss or damage.

7. That the merchandise, having been re-shipped from Los Angeles to Bakersfield and San Francisco, and having arrived there in a damaged condition, from the circumstances it would appear that the Railroad Company complied with the protective tariff regulations and with the Bill of Lading under which it was governed in delivery of the shipment to its track in Los Angeles.

8. That the only visible damage was to forty (40) cases of shrimp creole.

9. Since only forty (40) cases were visually discovered to be damaged at the time the merchandise was taken from the car in Los Angeles, Plaintiff is entitled to damages for the forty (40) cases so visible at Nine Dollars and Ninety Cents ($9.90) per case, or a total of Three Hundred Ninety-six Dollars ($396.00) plus freight in the sum of Twenty-six Dollars ($26.00) said freight being on the forty cases for which damages are given to the plaintiff, together with interest from April 1, 1946 in the sum of Fifty-three and 15/100 Dollars ($53.15), and costs of suit; that said judgment be against the defendant The Atchison, Topeka and Santa Fe Railway Company, a Kansas Corporation; that

the action be dismissed as to the defendant Jack Belyea, doing business as Refrigerated Express Company.

Let Judgment be entered accordingly.

Dated: March 29th, 1948.

/s/ CHARLES C. CAVANAH,
Judge of the United States
District Court.

Approved as to form:

LEO E. SIEVERT, LOUIS M. WELSH, FREDERIC A. JACOBUS and J. H. CUMMINS.

By LOUIS M. WELSH,

Attorney for Defendant The Atchison, Topeka and Santa Fe Railway Company.

/s/ LEO K. GOLD,

Attorney for defendant Jack Belyea d/b/a Refrigerated Express Company.

[Endorsed]: Filed March 29, 1948. [31]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 6835-Y

HAMILTON FOODS, INC.,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas Corporation, JACK BELYEA, doing business as Refrigerated Express Company, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Defendants.

JUDGMENT

This cause having been brought on for trial before the Honorable Charles C. Cavanah, Judge of the above entitled Court on the 9th day of March, 1948, and continuing thereafter to the 10th day of March, 1948, and a jury having been duly waived, and the Court having heard the witnesses on the part of the plaintiff and the defendants, and having examined the documentary evidence introduced on behalf of the plaintiff and defendants, and having heard the argument of counsel, Albert H. Allen appearing on behalf of the plaintiff, Louis M. Welsh of counsel of Leo E. Sievert, Louis M. Welsh, Frederic A. Jacobus and J. H. Cummins, having appeared for the defendants, The Atchison, Topeka and Santa Fe Railway Company, and

Leo K. Gold having appeared for the defendant Jack Belyea, doing business as Refrigerated Express Company, [32] and the cause having been submitted to the Court for consideration and decision, and, after due deliberation thereon, the Court filed its Findings of Fact and Conclusions of Law in writing and orders that judgment be entered herein in accordance therewith in favor of the plaintiff, Hamilton Foods, Inc., and against the defendant, The Atchison, Topeka and Santa Fe Railway Company; that a judgment of dismissal be entered as to the defendant Jack Belyea, doing business as Refrigerated Express Company.

Wherefore, by reason of the law and the findings aforesaid, It Is Ordered, Adjudged and Decreed, that Hamilton Foods, Inc., a corporation, the plaintiff, do have and recover of and from the defendant, The Atchison, Topeka and Santa Fe Railway Company, the sum of Three Hundred Ninety-six Dollars ($396.00) in damages, together with the sum of Twenty-six Dollars ($26.00) as freight, and together with interest on the said sum of Three hundred Ninety-six Dollars ($396.00), from April 1, 1946, in the sum of Fifty-three Dollars and Fifteen Cents ($53.15), together with its costs and disbursements incurred in this action, amounting to the sum of $105.80; that the plaintiff take nothing as against the defendant Jack Belyea, doing business as Refrigerated Express Company, and that

the defendant Jack Belyea have judgment for his costs incurred herein in the sum of $.....

Dated this 29th day of March, 1948.

/s/ CHARLES C. CAVANAH,
Judge of the United States District Court.

Approved as to Form:

LEO E. SIEVERT,
LOUIS M. WELSH,
FREDERIC A. JACOBUS and
J. H. CUMMINS,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant Santa Fe.

/s/ LEO K. GOLD,
Attorney for Defendant Belyea.

Judgment entered Mar. 29, 1948. Docketed Mar. 29, 1948. Book C.O.49, Page 623.

EDMUND L. SMITH,
Clerk,

By /s/ MURRAY E. [illegible]
Deputy. [33]

Received copy of the within Judgment this 24th day of March, 1948.

/s/ LOUIS M. WELSH,
Attorney for Defendant A. T. & S. F. Ry. Co.

[Endorsed]: Filed March 29, 1948. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

Notice is hereby given that the plaintiff, Hamilton Foods, Inc., hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on March 29, 1948.

Dated this 9th day of April, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,
By /s/ ALBERT H. ALLEN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 10, 1948. [35]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD TO BE CERTIFIED FOR APPEAL TO THE CIRCUIT COURT OF APPEALS

To the Clerk of the United States District Court for the Southern District of California, Central Division:

You are hereby requested to prepare the record for the United States Circuit Court of Appeals for the Ninth Circuit in connection with the Appeal taken herein, to consist of the following:

1. Complaint, filed April 21, 1947.
2. Answer of The Atchison, Topeka and Santa Fe Railway Company, filed May 12, 1947.
3. Answer of Jack Belyea, filed November 18, 1947.
4. Stipulation of Facts, dated March 8, 1948, filed March 9, 1948.

5. Stipulation of Facts, dated March 9, 1948, filed March 9, 1948. [37]

6. Deposition of Alvin H. Mazer taken January 6, 1948, Plaintiff's Exhibit 3, filed March 9, 1948.

7. Deposition of Alvin H. Mazer taken March 3, 1948, Plaintiff's Exhibit 3A, filed March 9, 1948.

8. Deposition of Hale C. Burrus taken January 6, 1948, Plaintiff's Exhibit 4, filed March 9, 1948.

9. Deposition of Hale C. Burrus taken March 3, 1948, Plaintiff's Exhibit 4A, filed March 9, 1948.

10. Original Bill of Lading, dated April 1, 1946 from Hamilton Foods, Inc., Plaintiff's Exhibit 5, filed March 10, 1948.

11. Freight Delivery Receipt No. 2778 RM, Defendant's Exhibit A, filed March 9, 1948.

12. Carbon Copy of Form 1891, Standard No. 316, dated April 9, 1946, Defendant's Exhibit B, filed March 10, 1948.

13. Excerpts from Perishable Protective Tariff No. B of Interstate Commerce Commission No. 22, Defendant's Exhibit C, filed March 10, 1948.

14. Plaintiff's Points and Authorities, filed March 15, 1948.

15. Defendant's Motion for Judgment, filed March 10, 1948.

16. Reporter's Transcript of Evidence, Vols. 1 and 2.

17. Judge's Oral Opinion transcribed, filed March 15, 1948.

18. Findings of Fact and Conclusion of Law, filed March 29, 1948.

19. Judgment filed March 29, 1948.

20. Notice of Appeal, dated April 10, 1948, filed April 10, 1948.

21. Statement of Points on Appeal.

22. Notice and Designation of Record to be certified.

You are requested to certify the foregoing to the United States Circuit Court of Appeals for the Ninth Circuit within forty (40) days from April 10, 1948.

Dated April 10, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,
Attorneys for Plaintiff
and Appellant.

[Endorsed]: Filed April 10, 1948. [38]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING OF NOTICE

State of California,
County of Los Angeles—ss.

Albert H. Allen, being first duly sworn, deposes and says that affiant is a citizen of the United States of America and a resident of the County and State aforesaid; that affiant is over the age of

eighteen (18) years and is not a party to the within entitled action; that affiant is an attorney at law, being attorney for the plaintiff appellant and that affiant has his business address at 9441 Wilshire Boulevard, Beverly Hills, California; that on the 9th day of April, 1948, affiant served the Notice of Appeal upon the defendants by serving a copy therewith on their attorneys as hereinafter set forth; that on the 10th day of April, 1948, affiant served a copy of the Statement [39] of Points on Appeal, a copy of the Designation of Contents of Record on Appeal, and a copy of the Notice to the Clerk, of attorneys to be served; that said documents were served on the aforesaid dates by placing a true copy thereof in each instance in an envelope addressed to the attorneys of record for said defendants in said action, which said envelopes were addressed to the attorneys of record for said defendants at the office address of said attorneys as follows: Robert W. Walker, J. H. Cummins and Louis M. Welsh, 448 Santa Fe Building, 121 East Sixth Street, Los Angeles 14, California; Leo K. Gold, 118 South Beverly Drive, Beverly Hills, California, and by sealing said envelopes and depositing the same, with postage thereon in full prepaid, in the United States mail at the city where is located the offices of the attorneys for the persons by and for whom said service was mailed.

That there is a delivery service by United States mail at the place so addressed, and there is a regu-

lar communication by mail between the place of mailing and the place so addressed.

/s/ ALBERT H. ALLEN.

Subscribed and sworn to before me this 10th day of April.

/s/ HYMAN GOLDMAN,
Notary Public in and for said County and State.

[Endorsed]: Filed April 13, 1948. [40]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

To the Clerk of the Above Court:

Notice is hereby given that The Atchison, Topeka and Santa Fe Railway Company, one of the defendants above named, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 29, 1948.

Dated this 13th day of April, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Cross-Appellant, The Atchison, Topeka and Santa Fe Railway Company.

[Endorsed]: Filed April 14, 1948. [41]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a Cross Appeal hereby taken. You will include in said transcript:

1. All of the evidence introduced at the time of trial and transcribed by the court reporter.
2. All exhibits admitted into evidence.
3. All stipulations of the parties admitted into evidence.
4. All orders, rulings and judgments of the court.
5. All pleadings presented to the court. [42]
6. This Praecipe and service thereon.

Said transcript is to be prepared as required by law and the rules of the court and the Federal Rules of Civil Procedure, and especially Rules 73 (g) and 75 (k) of the Rules of Civil Procedure for the District Courts of the United States.

Dated: April 14, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,
/s/ By LOUIS M. WELSH,
Attorneys for Cross-Appellant, The Atchison, Topeka and Santa Fe Railway Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 14, 1948. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR CLERK TO FILE RECORD AND DOCKET APPEAL

Upon the Affidavit of Albert H. Allen, one of the attorneys for the plaintiff, and upon the stipulation of counsel for the defendant, Louis M. Welsh, and upon good cause therefor being shown and it appearing that additional time is required to file the record and docket the appeal in the above entitled action, It Is Ordered that the time to file the record and docket the appeal and cross-appeal in the above entitled action be extended for an additional forty (40) days' time from the day in which the Clerk is now required to file the record and docket the appeal and cross-appeal.

Dated: This 10th day of May, 1948.

LEON R. YANKWICH,
Judge, United States District Court.

[Endorsed]: Filed May 10, 1948. [45]

[Title of District Court and Cause.]

STIPULATION

Be And It Is Hereby Stipulated by and between the plaintiff, by and through one of its attorneys, Albert H. Allen, and the defendant, by and through Louis M. Welsh, that the time for filing the record and docketing the appeal and cross-appeal in the

above entitled action be extended for a period of forty (40) days' time from the day in which the Clerk is now required to file the record and docket the appeal and cross-appeal.

Dated: This 4th day of May, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By ALBERT H. ALLEN,
Attorneys for Plaintiff-Appellant.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

/s/ By LOUIS M. WELSH,
Attorneys for Defendants-Appellees.

[Endorsed]: Filed May 10, 1948. [46]

[Title of District Court and Cause.]

STIPULATION AND ORDER

Be It And It Is Hereby stipulated by and between the plaintiff-appellant, by and through Albert H. Allen and Hyman Goldman, its attorneys, and the defendant-appellee, by and through Louis M. Welsh, that the Clerk of the above entitled Court be required to transmit all of the original exhibits in the above entitled action in their original form without requiring said Clerk to make copies there-

of, and that said original exhibits may be used in the appeal and cross-appeals before the United States Circuit Court for the Ninth Circuit.

Dated: This 4th day of May, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,
/s/ By ALBERT H. ALLEN,
Attorneys for Plaintiff-Appellant.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,
/s/ By LOUIS M. WELSH,
Attorneys for Defendant-Appellee. [47]

ORDER

Good cause appearing therefor it is ordered that the Clerk transmit to the Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced in evidence in the above entitled action.

May 10, 1948.

/s/ By LEON R. YANKWICH,
Judge.

[Endorsed]: Filed May 10, 1948. [48]

In the District Court of the United States, Southern District of California, Central Division

[Title of Cause.]

CERTIFICATE OF CLERK

I. Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain

full, true and correct copies of Complaint; Answer of Defendant The Atchison, Topeka and Santa Fe Railway Company; Answer of Defendant Jack Belyea, etc.; Plaintiff's Points and Authorities; Motion for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Affidavit of Mailing; Notice of Cross-Appeal; Praecipe for Transcript of Record; Order Extending Time to File Record and Docket Appeals and Stipulation therefor; and Stipulation and Order for Transmission of Original Exhibits which, together with original Plaintiff's Exhibits 1, 2, 3, 3-A, 4, 4-A and 5 and Original Defendants' Exhibits A, B and C, and Original Stipulation Approving Narrative Statement in Lieu of Transcript, Original Narrative Statement, and copy of Reporter's Transcript of Opinion of the Court, transmitted herewith, constitute the record on appeal and cross-appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $8.00 one-half of which has been paid by the appellant and one-half of which has been paid by the cross-appellant.

Witness my hand and the seal of said District Court this 24th day of June, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

/s/ By THEODORE HOCKE,
Chief Deputy.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 6835-Y

HAMILTON FOODS, INC.,
Plaintiff-Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation; JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,
Defendants-Appellees.

STIPULATION APPROVING NARRATIVE STATEMENT IN LIEU OF TRANSCRIPT

Be It And It Is Hereby Stipulated by and between the plaintiff-appellant, Hamilton Foods, Inc., by and through Albert H. Allen and Hyman Goldman, its attorneys, and the defendant-appellees and cross-appellants, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, by and through Louis M. Welsh, Frederic A. Jacobus and Joseph H. Cummins, its attorneys, that the Narrative Statement attached hereto be and the same is hereby considered as the agreed statement of the testimony in that certain action determined by the above Court, and that the same may be printed in lieu and in place of the Reporter's Tran-

script of the testimony in the above action, the Narrative Statement to be used in the appeal and cross-appeal of the above entitled action.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

/s/ By ALBERT H. ALLEN,
Attorneys for Plaintiff-Appellant.

LOUIS M. WELSH,
FREDERIC A. JACOBUS,
JOSEPH H. CUMMINS,

/s/ By LOUIS M. WELSH,
Attorneys for Defendant-Appellee, The Atchison Topeka & Santa Fe Railway Company.

[Endorsed]: Filed June 14, 1948. Edmund L. Smith, Clerk.

[Title of Circuit Court of Appeals and Cause.]

NARRATIVE STATEMENT

Be It Remembered that at the hearing in the above entitled cause, before the Honorable Judge Charles C. Cavanah, commenced on March 9, 1948, there appeared the following: Albert H. Allen, of Albert H. Allen and Hyman Goldman, on behalf of the plaintiff, and Louis M. Welsh, of Louis M. Welsh, Frederic A. Jacobus and J. H. Cummins, on behalf of the defendant, The Atchison, Topeka and Santa Fe Railway Company, a Kansas Corporation; that Leo K. Gold, attorney for the defendant, Jack Belyea, doing business as Refrigerated

Express Company, did not appear at the proceedings.

TESTIMONY OF ALVIN H. MAZER

on behalf of plaintiff, on direct examination by Norman H. Arons, through deposition taken in Chicago, Illinois.

My name is Alvin H. Mazer. I live at 230 North Pine Avenue, Chicago, Illinois. I am a frozen food processor and am associated [1*] with Hamilton Foods, Inc. They are located at 301 North Halsted Street, Chicago, Illinois. I am President of the company. I have supervisory duties. I take care of the factory. I supervise all shipments of merchandise. Hamilton Foods processes primarily shrimp products. By processing we mean that we prepare them in different forms. We prepare them, cook them and freeze them. At our present quarters we have our own freezing facilities and storage facilities. In April, 1946, and prior thereto, we were located at 231 West Chicago Avenue. We had our own sharp freezer and storage on the premises for maintaining the storage of frozen foods. We did not have enough facilities to store all our foods there. We froze and processed shrimp among our other products. At that time, all we processed at 231 West Chicago Avenue was shrimp creole exclusively. During the period of February, 1946, to April, 1946, we processed in excess of 1000 cartons of shrimp creole. From February 4, 1946, to and including March 27, 1946, I caused to be delivered

*Page numbering appearing at foot of page of original certified Transcript of Record.

(Testimony of Alvin H. Mazer.)

to the Fulton Market Cold Storage Company, Chicago, Illinois, 1000 cartons of frozen shrimp creole. It was not taken over in one shipment, we made several shipments. There are 25 pounds net to each carton. I know, of my own knowledge, the condition of the shrimp creole that was delivered to the Fulton Market Cold Storage Company during the period of February 4, 1946, to March 27, 1946. That merchandise was frozen at 15 to 25 degrees below zero, maintained at zero to 5 below and delivered in that condition to the Fulton Market Cold Storage Company. The Fulton Market Cold Storage Company is located at 1000 West Fulton Street and that is less than a mile from 231 West Chicago Avenue. It would take not more than ten minutes to transport the shrimp to Fulton. I gave instructions to Fulton as to the thousand cartons of shrimp creole that had been delivered by Hamilton. I advised them where the car was shipped to and specifically instructed them as to having a car that was pre-cooled and the condition of the car being such that it could handle frozen [2] foods. Those directions were given on or about April 1, 1946. I gave those instructions to the shipping department. that is, the traffic department of Fulton Market Cold Storage. The car was to be loaded with 1000 cartons of shrimp creole and shipped to Gouley-Burcham Company in care of Bay Street Perishable Team Track of Los Angeles. It was to be shipped through Chicago Milwaukee and St. Paul

(Testimony of Alvin H. Mazer.)

to Kansas City and thence west through Santa Fe. After the shipment of this car Fulton Market Cold Storage Company had no additional shrimp on hand. During the period mentioned we did not bring over in excess of a thousand cartons to Fulton.

Question: The particular shrimp creole that was shipped to Gouley-Burcham Company, you are able to state of your own knowledge was in good condition at the time it was packed and then shipped to Fulton Market Cold Storage Company?

Mr. Welsh: That portion we object to. We object, your Honor, to the question on the ground that it calls for a conclusion of the witness and there are no facts to support it. Now, the testimony so far has brought out that the shrimps were prepared, cooked and frozen. There is no testimony to indicate where those shrimps came from. I believe the court can take judicial notice of the fact that the shrimp do not come from any fresh water area, particularly not around Chicago. They must have come from some seaport to Chicago. There is no attempt to explain that and the question that asks the witness whether or not the shrimp were in good condition has no support in order to permit the court to accept his conclusion.

Mr. Allen: The witness was qualified, if the court please, as being a food processor.

The Court: Well, the court will reserve the ruling on the admissibility of this answer until you

(Testimony of Alvin H. Mazer.)

complete what other evidence you want to introduce as to the qualifications of this witness to express his opinion. I will reserve ruling on that. [3]

The Witness: I am able to state of my own knowledge that the particular shrimp creole that was shipped to Gouley-Burcham Company was in good condition at the time it was packed and then shipped to the Fulton Market Cold Storage Company. On April 1, 1946, we ordered dry ice in the amount of 1000 pounds to be sent over to Fulton Market Cold Storage to be included in that car as an added precaution.

The deposition of Alvin H. Mazer was then offered and admitted in evidence without further objection, saving the admissibility of the question and the answer raised by Mr. Welsh. Plaintiff's Exhibit 3A.

FURTHER TESTIMONY OF ALVIN H. MAZER

on behalf of plaintiff on cross-examination by Francis J. Steinbrecher, attorney for the defendant, The Atchison, Topeka and Santa Fe Railway Company, taken in Chicago, Illinois, Norman H. Arons, attorney, appearing for the plaintiff.

Cross-Examination

By Mr. Steinbrecher:

I am the Alvin H. Mazer, residing at 230 North Pine Avenue, Chicago, Illinois, who testified on the previous examination and deposition given by me

(Testimony of Alvin H. Mazer.)

January 6, 1948. I have been engaged in processing frozen foods at our plant at 231 West Chicago Avenue, for some time. We are not located there now. We are located at 301 North Halsted Street. At the time this shipment was made, we were located at 231 West Chicago Avenue. The only item we processed for a year prior to that shipment was shrimp creole. Prior to that time we processed other frozen foods. This particular shipment consisted of shrimp creole. I had experience in the shipment of shrimp creole before this particular shipment. It is pretty hard to say how many pounds of frozen shrimp creole we actually shipped prior to this shipment, but guessing it, it was with reference to cases or percentage of capacity. We have shipped to Los Angeles frozen shrimp creole from Chicago, which we shipped over Santa Fe. [4] There was no different refrigeration given that shipment than the one we are discussing at the present time. We shipped about 20 to 25 L.C.L. shipments and straight carload shipments by rail before this shipment. I can't give you the exact number or the approximate number of pounds in those shipments. I may have made more than 25 shipments by rail prior to this shipment, but I would say 20 to 25. Some of those shipments went to the West Coast in carload lots. The temperature of the car should be from 15° above zero downwards to properly preserve the shrimp during transportation. A part of this claim relates to the

(Testimony of Alvin H. Mazer.)

shipment transported to San Francisco. In processing the shrimp, we clean the shrimp, cook them, add them to a batch of prepared mixed vegetables, put them in small 14 oz. packages, seal them and freeze them from 30° to 35° below zero, pack them 24 packages to a shipping carton. Each package weighs 14 oz. We leave them in the temperature of 30° to 35° below zero until they are frozen, which is normally 8 hours then we hold them in a holding room from zero to 10° below. There can be a variance of 5° one way or the other, but they are held. When we get an order for shrimp creole to be shipped to the West Coast, we would accumulate 1000 cases or the amount of the order, at a cold storage plant, and give them instructions where we would want the merchandise shipped. At the time, our quarters were not large enough to hold 1000 cartons. Also we would have to ship out to one central point and rather than clutter the 1000 cases and move them as we would accumulate additional stock, we would send them over to the Fulton Cold Storage where they would hold it under the proper conditions. Our experience has been with previous shipments that the merchandise is not highly perishable if kept under proper refrigeration conditions. There would not be any more difficulty about getting it to its destination in a fit condition for human consumption if correctly handled. Even if the shipment might be as far away from Chicago as the Pacific Coast. [5]

(Testimony of Alvin H. Mazer.)

Redirect Examination of Mazer

The Hamilton Foods, Inc., is a corporation organized and existing under the laws of the State of Illinois, and it was such a corporation at the time of the institution of this suit. I am acquainted with and know the fair market value in the City of Chicago, as well as the City of Los Angeles, of 450 cases of shrimp creole at the time the shipment in question was made.

Question: Will you state what the fair market value is?

Mr. Steinbrecher: I want to object to that for this reason, there is no showing that he is qualified to say what the fair market value is on the Pacific Coast, inasmuch as he is a resident of Chicago and in business here.

Mr. Arons: I will qualify him further if you have objections.

The witness: Previous to my association with Hamilton Foods, I was a food broker. I dealt in frozen foods. Prior to my association with Hamilton Foods, I was a food broker for seven years. During that time, I had occasion to know the market value from time to time of various frozen foods, both in Chicago and the State of California on the West Coast.

Mr. Welsh: We shall so stipulate, Mr. Allen, that the value of your loss is $9.90 times the number of cartons lost, but our objection to this question is still pressed, your Honor.

(Testimony of Alvin H. Mazer.)

Mr. Allen: We are stipulating that $9.90 is the price per case.

The Witness: I knew particularly what the fair market value was of shrimp creole both in the City of Chicago and in the City of Los Angeles, California.

Question: Will you state what the fair market value was of 450 cases of frozen shrimp creole weighing 25 pounds a case, or carton?

Mr. Welsh: We make the same objection to that question.

The Court: Overruled. [6]

The Witness: It was $4455.00. The freight charges as to this particular shipment of shrimp creole was $294.75. Up to the time of suit, the storage charges in San Francisco where the shrimp creole was stored pending this litigation was $464.75, and it has been accruing at the rate of $35.40 per month. I do have an opinion as to whether a temperature of 50° to 54° would be sufficient to maintain frozen shrimp creole in good condition. Merchandise at 54° is not fit for human consumption.

Mr. Welsh: We have another objection. We do not feel that the storage bills, your Honor, are a measure of damages.

The Court: I will reserve ruling on that until I hear you in the argument. We will admit it, but the Court reserves ruling on the objection that the

(Testimony of **Alvin H. Mazer.**)

storage bill is not a proper item of damages, and I will hear you in your argument.

Question: Do you know at what the maximum or highest temperature that frozen shrimp creole can be maintained without decomposing or deteriorating?

Mr. Welsh: We object to both of the two questions and answers.

The Court: The same ruling.

The Witness: Would a shipment of shrimps arriving at a temperature of 50° or 54° be suitable for sale to the trade?

Answer: Definitely not.

Mr. Welsh: We object to this. There is nothing in the evidence, your Honor, to show that these shrimp were held at 50° or 54° yet this question is being asked of him as an alleged expert. He is not qualified. Mr. Arons himself previously stated that his knowledge of shipping had nothing to do with his knowledge of processing and I can read the section back to you, sir.

The Court: The same ruling.

The Witness: I would say that the maximum or highest temperature that frozen shrimp can be maintained without decomposing or [7] deteriorating would be from 20° to 25° above zero. If the temperature went above 20° to 25° the shrimp would begin to deteriorate and would not be fit for human consumption. It would start to decompose.

(Testimony of Alvin H. Mazer.)

Question: Do you know from your own experience what temperature would be maintained as a result of the instructions which were given to the railroad company here?

The Witness: A temperature of 10° to 15° above zero with a possibility of 20° high.

Mr. Welsh: The objection goes to this question also.

The Court: Objection overruled.

Recross-Examination of Mazer

By Mr. Steinbrecher:

The temperature of 50° to 54° which I have just testified to as undesirable would not necessarily have to prevail for some time, because the temperature does not drop from 20° to 54° in one minute. It is a gradual decomposition along the route. In other words, if it were 54° it would necessarily have to have reached the 54° temperature over a period of time, and food starts decomposing after a certain time, at a gradual stage. It is not instantaneous. I testified that a temperature of 20° to 25° above zero would be undesirable and would be unsuitable for the proper preservation of shrimp creole. A temperature of 50° to 54° would be undesirable for the preservation of shrimp creole. If we assume that the shrimp in this particular shipment, which I testified to, was subjected to a temperature of 54°, it is pretty hard for me to answer as to what my opinion would be of how soon deterioration in the shrimp would set *it*. A gradual

(Testimony of Alvin H. Mazer.)

decomposition takes place. The actual minute it takes places or where the actual breaking point is, I can't give you the answer to that. But, I have told you, over a certain temperature, any frozen food product will start to deteriorate and when it reaches 54°, it may have broken down at 30° or 35° and the balance of it over 50° to 54° may have been two hours, I would not know, but [8] it is gradually decomposing, but I can't tell you in hours what it would take. When you take a package of frozen food out from under refrigeration into an ordinarily heated room, it is immediately subjected to a temperature of whatever that room is. If the room were heated to a temperature of 80°, that package of frozen food would be subjected to a temperature of 80°. It would not become unfit for human consumption immediately upon being subjected to that 80°. If frozen shrimp creole is subjected to a temperature of 54° the mere fact that the package in which it is contained comes in contact with that temperature would not render the frozen shrimp creole unfit for human consumption unless that temperature were maintained for a period of time.

Mr. Welsh: We wish to renew our objection to the questions indicated for the record. There is nothing in the record at present to support hypothetical questions such as were asked—the condition of the car, the amount of ice put in the car. There is nothing except a bland statement about a car ar-

(Testimony of Alvin H. Mazer.)

riving with a temperature of 50° or 54°. We submit, your Honor, there is no foundation laid for such questions and move they be stricken.

The Court: The objection is overruled.

Mr. Welsh: It is probably time then, for me to raise again my objection to a question on direct examination which you reserved. The question is located on my copy of the first deposition on page 7, and it reads as follows: "The particular shrimp creole that was shipped to Gouley-Burcham Company, you are able to state of your own knowledge, was in good condition at the time it was packed and then shipped to Fulton Market Cold Storage Company?"

Now, our objection is predicated on the basis that although Mr. Mazer may be qualified as a food processor and may be qualified to state that everything he did to those shrimp was correct, there is nothing in the record to indicate where the shrimp came from or what condition they were in at the time they were processed. And as I [9] stated before, the court can take judicial notice of the fact that shrimp do not live in fresh water such as Lake Michigan and must have come from some seaport before they ever reached the plaintiff in this case. We therefore feel that the witness is not qualified to state generally as to the condition of the shrimp at that time, although he may be able to state what he did to shrimp and whether or not he processed the shrimp and whether or not those processes

(Testimony of Alvin H. Mazer.)

would turn out normal shrimp or healthy shrimp and in good condition.

The Court: Does his testimony show that he saw and knew this shrimp that is in question here?

Mr. Welsh: No, your Honor, it does not.

Mr. Allen: Excepting this, your Honor. I think the court can take judicial notice of the fact that a processor who is putting up a product which he is going to sell to the public, which he is going to label, which is going to go into interstate commerce and be subject to the Pure Food and Drug Act, isn't going to take a bad item and put it into a package.

Mr. Welsh: The court can't take judicial notice of that.

Mr. Allen: If I ship a carload of pencils I have a right to testify that when I shipped those pencils I shipped them in good order. I don't have to testify that I used a microscope to examine the material that was in them in order to so testify.

Take a processor like Van De Camps, who pack tuna or salmon or a processor or something—a man like Dole who ships out carloads of pineapple. The man who ships it and packs it in the carton has a right to testify whether or not at the time he shipped the carton it was in good condition without tracing the pineapple from the time it left the plantation to the time it got to the packing house.

Mr. Welsh: Those items are subject to an inspection of the United States Department of Agri-

(Testimony of Alvin H. Mazer.)

culture and the plaintiff here could have introduced evidence to show they were in good condition at the time they went into processing, but here we have an expert [9A] witness, an alleged expert witness, testifying as to the condition generally and not specifically of an item.

Now, he is qualified to testify as to whether the product he prepared, namely, shrimp creole, was proper but not as to the shrimp—that is, he can't as an expert testify as to the condition of the shrimp. Evidence could be brought in to show that but not from this man's qualifications.

Mr. Allen: That isn't what the question says. The question says the shrimp creole that was shipped to Gouley-Burcham Company, you are able to state of your own knowledge was in good condition at the time it was packed and then shipped to the Fulton Market Cold Storage Company, and the answer was, "Definitely."

Who else could tell except that processor?

Mr. Welsh: Your Honor, the shrimp creole could not be in good condition unless the shrimps were too. This is a compound product.

The Court: He is asking the direct question if he is able to tell whether this particular shipment was of good quality.

Mr. Welsh: There is nothing to indicate that he examined this particular shipment in the record. He explained generally how they process it but he didn't examine this particular shipment.

(Testimony of Alvin H. Mazer.)

The Court: This particular shipment is the primary factor involved. What was its condition at the time of shipment? Now, I realize that the plaintiff is predicating the opinion of this witness on his general experience in the past, being engaged in the business of shipping shrimp. I understand his reasoning, but whether or not one who ships shrimp would have to examine each particular shipment other than his general observation before he could testify whether it was in a bad or good condition—I am doubtful if they would have to do that.

Mr. Welsh: We are not asking anything unreasonable of the plaintiff. We don't expect them to examine every shrimp that goes in a can. [9B]

Mr. Welsh: We feel that inasmuch as the shrimp were gotten from some other location and were subjected to transportation prior to the time they were prepared, that they should at least bring in evidence showing from where they came, how they were shipped, the condition they were in when they opened the cars in Chicago and took the shrimp out and what they did with it generally to show the development of the case from the time the shrimp were taken out of the ocean and what happened to the shrimp from the time it arrived in Chicago and was taken out of the refrigerator car and put into process. That is not unreasonable.

Mr. Allen: If your Honor please, 500 cases or 450 cases of this same shipment were good and were used in the ordinary course of trade.

(Testimony of Alvin H. Mazer.)

Now, if counsel wants to pin-point that we deliberately picked bad shrimp from the ocean and shipped bad shrimp to Chicago and put those bad shrimp into cartons and shipped the bad shrimp out here for the purpose of this lawsuit that is another story.

Mr. Welsh: The argument is two-edged inasmuch as 450 cases arrived in good condition in that car. Perhaps they all arrived in good condition.

Mr. Allen: Would you like me to explain why it happened?

Mr. Welsh: It is irrelevant.

Mr. Allen: I shall be more than happy to explain to the court why that condition took place.

Mr. Welsh: The evidence will show that if at all.

Mr. Allen: Certainly it will.

The Court: I will give this matter a little further thought when I examine the entire testimony and see whether or not the doctrine you assert prevails. I will reserve my ruling until later.

Mr. Welsh: Do you wish our objection to be raised at the end of the trial, sir?

The Court: Yes. [9C]

The Court: But in considering the form of the question, it is asking for his own knowledge and it would seem he could answer that. Then if he did not have knowledge, you could have cross-examined or you could have argued here before the court that

(Testimony of Alvin H. Mazer.)

he did not have any knowledge and therefore that his opinion has no weight. But as far as his disability is concerned, it is a question as to his own knowledge so I think I will have to overrule the objection. I wanted to bring that up before you recessed. I think that when considering the form of the question that it is all right but you can argue as to the weight when we come to that.

The depositions of Mazer were then received in evidence as Plaintiff's Exhibits 3A and 3B.

TESTIMONY OF HALE C. BURRUS

taken on direct examination by Norman H. Arons in deposition in Chicago, Illinois.

Direct Examination

My name is Hale C. Burrus. I live at 4867 West Concord Place, Chicago, Illinois. I am Assistant Superintendent of Fulton Market Cold Storage Company. They are located at 1000 West Fulton Street, Chicago, Illinois. My particular duties consist of supervising, unloading, loading, and storage of merchandise. I have been with the Fulton Market for 24 years. Prior to the time I was Assistant Foreman, I was a checker. I was Assistant Superintendent for 18 years, 6 years as checker and cooler foreman. I am acquainted with the method and manner of packing perishable foods in refrigerator cars to be shipped across country. Between February 4, 1946, and April 1, 1946, we received from the Hamilton Foods, Inc., 1000 cartons of shrimp creole for storage. These were received at various

(Testimony of Hale C. Burrus.)

times between those dates. On February 12, 1946, we received 125 cartons, our Lot No. 23903; on February 13, 1946, 250 cartons, our Lot No. 24241; on March 18, 1946, 300 cartons, our Lot No. 25404; on March 27, 1946, 300 cartons, our Lot No. 25790; on April 1, 1946, 25 cartons, our Lot No. 25878. All of the shipments which I just mentioned were thoroughly frozen. Upon receipt of the cartons, we unloaded them off the truck, put them in our storage room which is held at 15° below zero. On April 1, 1946, we received instructions to ship the merchandise from Hamilton Foods, Inc. We had instructions to ship these five lots which amounted to 1000 cartons of shrimp to Gouley-Burcham, c/o Bay Street Perishable Team Track, Los Angeles, California. We loaded these 1000 cartons into ERDX 2667. That is the number of the car. This car [10] arrived at the Fulton Market Cold Storage Company April 1, 1946, which we set for unloading at 7:00 o'clock that morning. The car contained frozen poultry at that time. The poultry in the car arrived in perfect condition. The merchandise was perfect. The car was pre-cooled at the time of its arrival. The 1000 cartons of shrimp in question were loaded into that car in the afternoon of that day. The cartons were laid on the floor two and three cartons high in the car. The car came in with 10,300 pounds of crushed ice in the morning. Around 2:00 o'clock in the afternoon, it was then filled to capacity with crushed ice and 3900 pounds

(Testimony of Hale C. Burrus.)

of salt. The Chicago, Milwaukee and St. Paul Railroad caused it to be so filled. The car was sealed with our seals. Fulton Market Cold Storage Company seals Nos. 4563 and 4564. Instructions were given to the Chicago, Milwaukee and St. Paul Railroad with reference to the icing in transit. The particular instructions were as follows: "Initial icing to capacity with 13,000 pounds crushed ice and 3900 pounds of salt. Re-ice at all regular ice stations with crushed ice and 30% salt and oftener, if delayed." In addition to that there were 20 cakes of dry ice furnished by the Hamilton Foods Company, Inc., which were distributed throughout the top of the load. The ice was placed in the car by us. Each cake of ice weighed approximately 50 pounds. Each carton averaged 25 pounds of shrimp. The particular shipment was placed in Car No. ERDX-2667, which is a refrigerated car. In my experience for over 18 to 24 years this type of car has been used regularly in the shipment of perishable foods. There are different types of cars from the particular type of car for the shipment of perishable foods. Some of these cars have side-stripping. From my experience I can say that the percentage of cars with stripping is very, very small. From my experience in loading perishable foods in refrigerated cars, I would say that the practice which we used and engaged in in loading this car was good practice. This practice has been used by us before. It had been used thousands [11] of times

(Testimony of Hale C. Burrus.)

without any loss of food or materials. I have no opinion as to whether cars with stripping or cars without stripping are better so far as keeping the merchandise refrigerated. My experience has been that one car is as good as the other. Percentage-wise, less than 5% of the refrigerated cars have stripping on them. We finished loading the car about 3:00 o'clock in the afternoon. We started about a quarter after one. The St. Paul iced the car at around 2:00 o'clock.

Cross-Examination

of Hale C. Burrus taken by Francis J. Steinbrecher. Deposition in Chicago, Illinois.

I am the same Hale C. Burrus residing at 4867 West Concord Place, Chicago, Illinois, who testified at the previous examination in this matter. I am the Assistant Superintendent of the Fulton Market Cold Storage Company, which is located at 1000 West Fulton Street, Chicago. With reference to the shipment of frozen shrimp creole, my experience has been regarding the refrigeration, that is proper refrigeration, necessary in a freight car for transportation of that commodity is to ice the capacity with crushed ice, 30% salt. That is the initial icing. I mean that if there were a 1000 pounds of ice, there would be 300 pounds of salt. That is the first initial icing, the preparation of the car for shipment. If a car comes in that has already had ice in them, it is topped off to the capacity of the car and 30% of the capacity of the car is put in, not

(Testimony of Hale C. Burrus.)

just 30% of what they top the car off with. I am speaking of a car that came in under load in this particular instance. The car came in under load. This particular car that carried this shipment at the time had 10,200 pounds of ice in the car. Now when we reloaded this car with the creole, the balance of the car, the capacity of the car, crushed ice was put in this car. But a total of 30% of the salt was put in. In other words, the capacity of this car is 13,000 pounds of crushed ice and a total of 30% is added to [12] it which is 3900 pounds of salt. That would be filling the bunkers to the top. There were 20 cartons of dry ice distributed on the packages of creole throughout the load. These packages weighed an average of 50 pounds each. Only dry ice was put in the body of the car. I can't recall that we have had experience with this particular type of car. We have had shipments of frozen foods all the time. We have had experience in the shipment of frozen food in cars of this type and in this type of car. With other commodities, anyway. I don't believe there is anything particularly perishable about shrimp creole to make this shipment of frozen shrimp creole require a greater care in handling than any other type of frozen product. The car which was used was suitable for the purpose. I can't recall having any particular experience in preparing a car of frozen shrimp creole from Chicago to the Pacific Coast, but we have had vari-

(Testimony of Hale C. Burrus.)

ous other frozen foods for shipment. The frozen shrimp creole was maintained at our storage warehouse prior to being placed in the freight car at a temperature of 15° below zero. The salt and dry ice that was placed in this car should maintain the temperature of this car from Chicago to the Pacific Coast, assuming that the car was re-iced and re-salted at regular stations en route, at a temperature of between 10 and 15 degrees above zero. There was no stripping on this car, as I recall. Stripping has various meanings. Some cars just have a piece of a half an inch, maybe an inch strip of lathe nailed to the side of the car. That is board nailed to the frame of the car, nailed to the side of it on the inside. I presume it is for ventilation. Stripping the car would prevent the lathing from being placed against the wall of the car. The purpose of it would be to permit easier ventilation or circulation of air throughout the car. There are other ways of stripping a car. A few cars have a rack, some sort of a rack that is nailed along the side in the same manner, only that may protrude out maybe 2 inches. You can also strip a car by placing board or lathe between each layer of the commodity shipped. [13] You can also strip a car by putting lathes in between the tiers in the car. That would also be called stripping. The preparation given to this car, in the way of pre-cooling, and the request for re-icing enroute, would normally be sufficient to maintain this commodity in a suitable con-

(Testimony of Hale C. Burrus.)

dition enroute from Chicago to California, assuming, of course, it was given regular re-icing stations.

Re-direct Examination

By Norman H. Arons. Deposition in Chicago, Ill.

I would say that a car arriving at a temperature of fifty to fifty-four degrees would be an improperly refrigerated car, with reference to the type of shipment involved in this suit. If a car were iced in accordance with the instructions in this particular case, the car would not arrive at a temperature of fifty to fifty-four degrees. The relationship between the percentage of salt and the amount of ice to maintain the temperature is this: the more salt you use, the lower your temperature and the cars have to be iced regularly, not later than every twenty-four hours in order to maintain that temperature that you have in there. The more salt you have the colder the temperature you get, but the less time it lasts.

Re-Cross Examination

By Francis J. Steinbrecher. Deposition in Chicago, Illinois:

The 54 degree temperature that would be suitable for this shipment would have to be maintained for a period of hours rather than minutes to damage the commodity.

The Deposition of Hale C. Burrus was then offered and received in evidence, the deposition of Mr. Mazer being Plaintiff's Exhibits No. 3-A and No. 3-B and the deposition of Mr. Burrus being Plaintiff's Exhibit No. 4-A and No. 4-B.

TESTIMONY OF JACK BELYEA

called as a party defendant in Direct Examination under the rules.

Direct Examination

By Albert H. Allen:

Mr. Welsh then raised the objection that the defendant, Belyea, was not properly called as a party defendant under the Rules by reason of the fact that the defendant was a bankrupt.

The Court: He is still a party to this action. The only difference is that the bankruptcy proceedings has discharged him from the payment of any judgment that might be entered against him in this action. He is still a party to the action and he has not been dismissed. I think he would come under the Rules that you are calling him under. He hasn't been dismissed. He is still a defendant. I will have to grant your contention, Mr. Allen.

The witness then testified as follows:

I reside at 604 Vane Avenue, El Monte. I was subpoened at one time jointly with the Atchison, Topeka and Santa Fe, and when I say "subpoenaed" I mean I was served with summons and complaint. At present I am in sales and traffic and employed by the Belview Creamery and Produce Company. My duties consist of sales work and traffic management. In that work I handle frozen products. On April 11, 1946, I was the owner of a refrigerated express or refrigerated trucking concern. That business consisted of transporting perishable commodi-

(Testimony of Jack Belyea.)

ties or anything requiring refrigeration. Prior to April 11, 1946, for about 18 months, I was in business for myself, and prior to that time I had been handling perishable commodities in shipment, for approximately 10 years. About April 8, 1946, I received a notice as to a shipment of shrimp creole consigned to Gouley-Burcham and Company, of Los Angeles. I received notice by telephone that a car of shrimp creole was due to arrive and they at that time notified me of the car number and stated that it would be spotted on the Bay Street team track for distribution. I was to [15] await the proper papers giving me the breakdown as to who the consignees would be on the merchandise. At that particular time there were 500 cases destined to come off in Los Angeles and they would give further shipping instructions upon arrival of the car.

Q. Now when was the first time that you received any information that the car was here?

Mr. Welsh: We object to the question, your Honor. It is irrelevant when Mr. Belyea received notice. It is relevant when the consignee received notice but not when Mr. Belyea received notice.

The Court: Objection overruled. It is just preliminary.

The Witness: If I recall, I believe I first received notice on the 10th of April that the car was in Los Angeles, but had not been spotted on the Bay Street perishable team track as yet, and that Mr. Holman would notify me when the car was available and for unloading. However, if I recall, that

(Testimony of Jack Belyea.)

car was not spotted in a place on the team track where we could unload it; that there had to be another switch engine come in and hook on that car to transport it to another track more suitable for unloading.

The track, as I recall, had no roadway into it and there were cars lined up on the opposite side from where there was no road so it was completely blocked off from getting in to open it up and transport out any of the merchandise. Mr. Holman is the Santa Fe man in charge of the Bay Street perishable team track. Between April 8 and April 10, I made a couple of checks to find out what information he had upon this particular car. I made those checks with Mr. Holman. Mr. Holman hadn't any information at the time. He said that he would call when the car was in and spotted.

Q. Now, when was the first time that you had any information that the car was in and spotted and available for unloading?

Mr. Welsh: May I ask counsel, your Honor, information from whom? [16]

Mr. Allen: From the Santa Fe.

Mr. Welsh: Your Honor, I would like to place my objection again. The rail carrier is under an obligation to notify the consignee named in the bill of lading of the arrival of a car. Mr. Belyea isn't a party to this action. He was not a consignee named in the bill of lading and it is beyond me to see the relevancy of when Mr. Belyea was informed unless

(Testimony of Jack Belyea.)

it is first connected up to show his name appeared on the bill of lading.

Mr. Allen: May we ask this, your Honor? May we ask your Honor to withhold the ruling at this moment and let me proceed further with this witness and whether we will connect it up by bringing in the consignee who will testify.

The Court: Very well, I will withhold ruling and unless you make the connection the objection will be granted.

Q. By Mr. Allen: When was the last time you spoke with Mr. Holman as to the location of this car prior to its actually being spotted on the Bay Street team track?

Mr. Welsh: If Mr. Allen is going ahead with this line of questioning, your Honor, I think I am justified in objecting on the ground that—

The Court: He will make a connection?

Mr. Welsh: He is asking about a condition and giving no place, time, circumstances, or anything else, or persons present or how the conversation took place.

The Court: As to his dealing with the railroad. You have to make some connection before his evidence will be competent here to bind the railroad.

The Witness: I am trying to recall when I first observed the car. It was in the afternoon and I don't recall whether it was either the 10th or 11th of April. I observed the car on the same day on which the car was opened. I don't recall whether that was the 10th or the 11th. It seems like it was

(Testimony of Jack Belyea.)

a Thursday. It was a [17] Thursday. The car was opened in the afternoon. When I reached the car the car was sealed, the seal had not been broken. To all apparent appearances, the door was all right. I broke the seal. I tried to open the door and I had to have a little assistance to get the door open. Apparently it was jammed. I got the door open with a little help. When I opened the door, the first thing I spotted were the wet cases. The wet cases were located along the side where the door opened. It was along the side of the door opening. When I observed that the cases were wet, I pressed against one of them with my hand and felt it quite soft, so I pushed my finger against the carton, and it was so wet that it went right on through and into the inside container. I closed the car up. I went with one of the employees of my firm down to the office to get Mr. Holman and I went over in search of a thermometer. I was able to locate one a block away, and brought it—I was able to borrow it and brought the thermometer back with me. Between the time that I opened the door and went to get the thermometer I closed the door. It took me ten minutes to get the thermometer. When I came back with the thermometer, Mr. Holman was there. He asked me what the difficulty was and I told him that we had some bad order merchandise in that car. Mr. Holman said "What are you going to do" and I said "I am going to take temperatures and find out. It is so late in the day we are going to have to start to move."

(Testimony of Jack Belyea.)

Mr Welsh: Well, of course, your Honor, what Mr. Holman said is purely hearsay.

Mr. Allen: Mr. Holman is the agent of the Santa Fe Railroad. Is there any dispute about that?

Mr. Welsh: No dispute that he is the agent.

The Court: It was within the scope of his authority to be there and act for the railway company.

Mr. Welsh: It is within the scope of his authority to open cars, to give them to a consignee but not make remarks concerning [18] the condition of the lading.

The Court: Objection overruled.

The Witness: Mr. Holman asked me what I was going to do and I told him I had better take the temperatures. So we proceeded to open up the car and put the thermometer in. Mr. Holman was present at the time. I put the thermometer on top of the load. I placed it with the back of it up against a case, to stand it upright and closed the car back up again. I took a reading on that thermometer. It was 54 degrees. I left the thermometer in the car 15 minutes before I took the reading. Mr. Holman was present at the time. I took a subsequent reading. The subsequent reading was taken by placing the thermometer underneath the floor racks in the car. I believe Mr. Holman was present at the time. He left for a few moments to go back up to the office and he came back again and I believe that he was there, if I recall, when the thermometer was removed the second time. The thermometer regis-

(Testimony of Jack Belyea.)

tered 50 degrees. Then I closed the car up and went to call Mr. Lloyd Smith of Gouley-Burcham Company. Mr. Smith wasn't in town so the only thing to do was to find someone that would have knowledge of what should be done about the merchandise, so Mr. Dominis, who was with the Pic'N'Time Frozen Foods, who was the largest consignee in the car, I called to have him come over and make an inspection. He came over and he made an inspection in my presence and in the presence of Mr. Holman. Mr. Holman asked Mr. Dominis what he thought of the condition of the merchandise and he told him that he thought he could save a number of cases, due to the fact that they were located so close to the team track, which was approximately ¾ths of a mile, and we could transport it over there and get it into his sharp freeze, and that he thought his merchandise would be all right. I proceeded to unload the car. Mr. Dominis stayed there for the greater portion of the unloading time and he was able to pick what he wanted to. Mr. Dominis did not take the cases just as [19] they came out of the car. If they showed no evidence of being soft or wet or mushy, he accepted them. He took the cases which were hard and appeared frozen and those were the cases which he removed. If I recall, I believe he removed 450. If I recall, there were 50 more cases consigned to another frozen food company and we also delivered those 50 cases, which made a total, if I recall, of 500 cases that came off

(Testimony of Jack Belyea.)

in Los Angeles. Those 50 cases were not handpicked.

Q. Were they also handpicked? A. No.

Q. Just took the cases which appeared hard?

A. That is right.

Mr. Welsh: I object to that question as leading and putting a conclusion in the mouth of the witness.

The Court: Sustained. It is leading.

The Witness: As to the other 50 cases, we never made any special effort to pick over the cases for them due to the fact that they were located so close by we just picked them at random. The soft merchandise, that was apparently already gone, we left in the car. I would estimate there were somewhere between 25 and 40 cases. The 25 to 40 cases which we didn't touch at all we just left in the car until the reefer arrived. As to the other 400 some cases, shortly afterwards the line reefer truck that was destined to take it on to its destination arrived and we completed the unloading. When I found evidence that the shrimp was soft, I made an attempt to find available refrigeration plant space in Los Angeles. I tried to get Mr. Dominis to take the balance of it in but his storage plant was all filled up and he couldn't take any more than he already had consigned to him. So, I called everyone in town. In fact, as far as Pomona I called to secure space to put this merchandise away, because due to the condition of it it should have been put in a sharp freeze to pull the temperature back down on it so

(Testimony of Jack Belyea.)

it could go on to its destination. I was not able to find any space. By a reefer I mean a refrigerated truck, the temperature controlled by mechanical refrigeration with insulated body. I had a Diesel [20] truck and trailer. It was a reefer. It had four inches of spun glass as insulation. It had a mechanical refrigeration cooling system operated by a gasoline motor and electric generator. It was in operation that day. The refrigeration on my truck does not operate as a freezing unit. It couldn't freeze due to the fact that it won't bring the temperature down to freeze a commodity. However, it will hold a temperature that it was in—that was in the commodity at the time of acceptance. In other words, if the commodity was 10 degrees it would hold the commodity at that point and if it was zero it would hold it at that point and at 50 degrees it would hold it at whatever point the commodity was with the exception that there might be a loss of a few degrees of temperatures over a period of time. We had regularly used this reefer truck for hauling other perishable merchandise. We had never had any trouble mechanically with it. The merchandise was loaded into this reefer. Fifty cases were consigned to Bakersfield. I don't recall the amount of cases that were consigned to Sacramento. And the balance that was left over between Bakersfield and Sacramento was to go into San Francisco for several consignees. When the merchandise got up there it was apparently not acceptable. When Mr. Holman was present and the door of the car was opened, I

(Testimony of Jack Belyea.)

called his attention to the fact that the merchandise was wet and soft because I wanted to take a blanket exception on the whole car. I didn't want to accept any responsibility so far as I was concerned. The car was in bad order. Mr. Holman said he wanted to arbitrate as to how many cases were bad. He would allow me to take an exception of some, but he wouldn't allow me a blanket exception on the entire car. Under the circumstances when time was running out, it was getting late in the day and no cold storage facilities available, the only alternative left to protect all parties concerned was to get it on the truck immediately and get it transported to its destination. I know what the condition was in Los Angeles at that time as to cold storage space. It was very critical. I attempted to find cold storage space to move this merchandise into. It was 4:30 in the afternoon [21] when I finished unloading the car. I can't remember what else might have been said by Mr. Holman, it would be just a guess, it has been so long ago. The Bay Street terminal is in the industrial district in Los Angeles. There are no facilities there for unloading other than the roadway where you can get into the side of the car. Mr. Holman has an office there. His office is on the end of the perishable dock. When I went to call Mr. Holman I went to his office. Prior to the day on which this car was unloaded I had talked with Mr. Holman on the telephone. If I recall, I believe I called him two or possibly three times to find out when he had some definite idea when it would be spotted

(Testimony of Jack Belyea.)

so I could program my work ahead. Mr. Holman told me he would notify me.

Mr. Welsh: I object to that on the grounds, your Honor, that it is not relevant whether Mr. Holman said he would notify him or not. We are now contesting a contract action.

The Court: He said he was going to connect it up. If it is not connected up it will be stricken. Mr. Holman represented your people.

Mr. Welsh: But Mr. Holman doesn't have authority to re-organize contracts for us.

The Court: This is preliminary to what was done and then we will determine what his authority was. It is preliminary. What the agent's authority was is another question. Go ahead.

The Witness: I knew Mr. Holman approximately 18 months prior to this time. I had unloaded merchandise from that area before. If Mr. Holman was on duty I would contact him to determine whether a car was available for unloading. If he was not on duty I would contact any other people that were associated down there at the team track that happened to be on duty at the time. In other words, I was acting as agent for the consignee in moving the merchandise. And as to the availability of cars for unloading, I would contact the Santa Fe office. The Santa Fe office would tell me when the car was available for unloading. I am sure I unloaded the car on the [22] same day it was available for unloading. I know there was some difficulty about the car being spotted. I am just a little hazy between

(Testimony of Jack Belyea.)

dates, whether it was the 10th or 11th and I don't quite recall which day that was.

The Court: Who was attempting to spot this car? Who was attempting to do that?

Mr. Welsh: The Santa Fe Railway.

The Witness: I attempted to check the ice in the car. I found some ice in the car. I would estimate the bunkers were half full. There was no dry ice on the packages. The wrappers that had been around the dry ice were still there but the dry ice was no longer present. When I opened the door to the car it did not appear to be very cool because there was not the sudden gust of vapor and cold air that usually comes out of a car when it is opened. When you open a car there is usually a gust of cold air that comes out. When I opened this door, I did not find any such evidence.

Mr. Welsh: I would again like to raise my objection before I begin cross examination, inasmuch as counsel has tied up with Mr. Belyea the Gouley-Burcham Company, the consignee, but in no place has he indicated that the Santa Fe, the other contracting party, had notice of Belyea's connection with Burcham and Company and we feel therefore that the evidence as to when Mr. Belyea was notified is irrelevant, sir.

The Court: Objection overruled.

Cross Examination

By Mr. Welsh:

I had approximately 10 years' experience with frozen foods. I have seen quite a few refrigerated

(Testimony of Jack Belyea.)

cars in my time. There are some cars that have insulation more than others. I know that some refrigerated cars have built in stripping along the inside of the doors and sides and some are new and some are old. The bunker [23] capacities of refrigerated cars vary. In the newer cars there are bigger bunkers. They are bigger in the newer ones than in the older cars. I told you the other day that I had been on the transportation committee of the Southern California Frozen Food Council. That Council is an association of processors and distributors. At the present time I am handling frozen poultry and dairy products. I told you I have collaborated with the author on several articles in regard to transportation of frozen commodities and it appeared in a magazine called Food Freezing Magazine, a trade journal.

Mr. Welsh: I have attempted to draw on the board, Mr. Belyea, a primitive form of a refrigerator car. I have indicated the doorway opened, the two doors on either side; the bunkers on the extreme end of the car and a representation of the vents and plugs. The dotted line underneath the vents and plugs from the wheels to the top of the car are to represent the bunkers. Now, if you will take the piece of chalk I have in my hand and indicate where you found the wet cartons I shall appreciate it.

Witness: I will illustrate by indicating a line here as the top of the load. The cartons, of course, were staggered somewhat.

(Testimony of Jack Belyea.)

Mr. Welsh: The witness has indicated cartons in the doorway half of the way from the floor to the top of the doorway.

The Witness: Now, on the bottom here, to add a little bit to counsel's diagram, are the floor racks which allow for the bottom circulation. The wet cartons upon opening the door were found on that edge. They were found on both edges of the doorway. The thermometer was placed to the right hand side halfway between the door and the bunker. One case was lifted up out of the center of the load and used as a stand or brace to stand the thermometer up against. The thermometer was placed halfway between the door and the bunker. I got the thermometer from a concern by the name of Marshall and Anderson Company. I have had considerable experience along the lines of refrigeration. [24]

Q. Had you been able to get that whole carload of shrimp creole frozen in the warehouse, a cold storage warehouse in Los Angeles, is it your opinion that there would not have been any damage to those cartons?

Mr. Allen: Just a second. I will object to that. This witness has not been qualified as an expert on perishable foods or the condition nor has there been a sufficient foundation laid, nor sufficient facts in the hypothetical question to determine whether he could ascertain what would happen to that food.

The Court: Objection overruled.

The Witness: Well, that is a rather hard question to answer. Providing that the cold storage

(Testimony of Jack Belyea.)

warehouse would have accepted the merchandise.

Q. Well, let us further assume that the cold storage warehouse would have accepted the merchandise. Now, can you answer the question.

The Witness: Well, between 25 and 40 cases were in very, very doubtful condition.

Q. And as to the rest of the car?

The Witness: I believe those could possibly have been saved. I did in fact make an attempt to get the whole carload, with perhaps the exception of 25 to 30 cases, into cold storage. It was my thought that if I had been successful in doing so that the cartons probably would have been saved—that is the shrimp would probably not have been damaged. I have seen refrigerator cars come in stripped. Most cars don't have permanent stripping racks in them. I have seen a few that have, but most of them, the racks have to be put in at the time of shipment. They have to be put in by whoever is loading the car or is responsible for the loading of it. They will take approximately a strip one by three or possibly one by four and will nail it to the walls periodically along the side, approximately, oh, anywhere from a foot to 18 inches apart and will cross them—make a [25] sort of lattice work out of it. In the first place the strips are in vertically and are nailed across hortizontally—the strips—other strips are nailed across horizontally to create a kind of checkerboard affair or lattice effect. The purpose of stripping is to prevent the commodity or lading in the car from touching the sides of the car. It per-

(Testimony of Jack Belyea.)

mits a certain amount of air circulation throughout the car. The sun beats down on a car if it is spotted. The sun strikes the outside of the car. In the absence of perfect insulation some of that heat may be transmuted from the outside of the car to the inside of the car. The stripping helps to prevent that heat from actually penetrating the commodity.

Q. Is it not your opinion, Mr. Belyea, that had this car—this car numbered ERDX-2667 containing the commodities which are now—which is the subject matter of this lawsuit, been stripped there would have been less probability of damage upon arrival.

Mr. Allen: Just a second. I will object to that, if your Honor please, as calling for a highly questionable and certainly speculative answer at most.

The Court: It actually goes to the weight of his testimony. He may answer the question.

The Witness: My experience in handling cars, the transportation of frozen and perishable commodities, I have found instances where cars were not stripped that came through in good condition and I have found cars that were stripped that came through in the same condition. However, if you have asked my opinion on it I would prefer a stripped car. And in fact any cars at present that are loaded out of our establishment I see that they are stripped before they leave. However, we do have cars come in that are not stripped and have a very, very low claim ratio. But it is my experience that a car is preferably stripped. When frozen

(Testimony of Jack Belyea.)

commodities go out and the loading of the car is under my control I see to it that they are stripped. When I was operating my refrigerator trucking business [26] I had from five to seven trucks. They were trailers and tractors. I had five to seven trailers and five to seven tractors. Most of the trailers were stripped, particularly on the long hauls. Anything which was used for hauling over 100 miles was stripped. I had two types of refrigeration mechanism on the trailers. On the shorter haul trucks we used just straight dry ice. In the longer haul equipment we used dry ice in a combination with gasoline motor and electric generator to operate a series of blowers that would pass a current of air by the blocks of dry ice and agitate the circulation of the refrigeration throughout the commodity. On the truck that left Los Angeles with the shrimp, we used a truck that had refrigeration equipment on it. We had equipment on it besides the dry ice. It *we* mechanical refrigeration. The mechanical refrigeration was run by a gasoline motor that operated the generator and was a five horsepower motor and the electric generator which it converted the direct current through was one and a half horsepower. While the truck would travel through such an area as the San Joaquin Valley in April, I could maintain the temperature that was in the commodity in the time of loading. If I put a commodity in the truck which was 80 degrees Fahrenheit at the point of origin there would be a reduction of temperature, but where the temperature of the

(Testimony of Jack Belyea.)

commodity was around anywhere from zero to 15 degrees above I could maintain the temperature that was in the commodity at that time. If the temperature of the commodity was 25 degrees when I put it in the truck, by increasing the amount of dry ice on it, putting it in direct contact with the product, providing enough was used, with the circulation, I could probably pull it down 15 degrees.

Q. If the commodity was 54 degrees, how long could you pull it down to, using both dry ice—how low could you pull it down to using dry ice and refrigeration as you used in this case? In other words, if we assume that some of the cartons you loaded into your truck were 54 degrees and assuming further that you put in the [27] amount of dry ice which you did put in and the amount of mechanical refrigeration that you used, what could you bring the commodity temperature down to or would you merely maintain it at 54 degrees?

The Witness: Well, it would drop down some, depending upon the amount of dry ice in that truck. In that particular instance we had 2500 pounds. We could pull it down to approximately around 20 degrees. We could bring it down an additional 20 degrees, to approximately 32 or 34, somewhere in that neighborhood. I don't think that the cartons would be hard upon arrival in San Francisco if they were soft upon departure from Los Angeles. The cartons that were in the car would remain soft all the way. If I remember correctly, the exceptions that were taken on the bills, I believe it was on

(Testimony of Jack Belyea.)

them—they took a blanket exception on the whole amount that went into the Merchants Ice and Cold Storage, and if I recall the statement was made that there were approximately 40 cartons soft, but they were dubious of the shipment and took an exception on the whole total amount of cases.

Q. In other words, because there was 40 cartons that were soft on arrival in San Francisco, the cold storage warehouse there refused to take the whole shipment of 400 some odd cartons, is that right?

Mr. Allen: Just a second. I will object to that as asking this witness's conclusion.

The Court: He is asking if it did occur. He didn't ask for a conclusion. He asked him does he know whether that was done or not.

Mr. Allen: That isn't the way the question was asked. May we have the question read, your Honor?

The Court: Read the question.

(Question read.)

Mr. Allen: If he knows.

The Court: That is a direct question. The objection is overruled. [28]

The Witness: Well, Mr. Burt, who is Gouley and Burcham's representative in their San Francisco office, apparently was notified by Merchants Ice and Cold Storage that they did not want to accept the shipment and upon talking to Mr. Burt, after he had made the inspections he clearly stated to me that some cartons in the load were soft and right next to that particular soft carton would be one that was hard and in a suitable frozen condi-

(Testimony of Jack Belyea.)

tion, but due to the commodity being [28A] perishable to the extent that it was, Merchants felt that they did not want the responsibility of receiving that in and taking only an exception to that specified amount of cases. I didn't happen to be in San Francisco at the time when the truck arrived. All I have is the information conveyed to me by my employee who happened to be on the truck making the delivery.

Mr. Allen: Just a second. I move all that be stricken on the ground it is hearsay.

The Court: It is hearsay at the present time.

The Witness: I owned the truck. It was my company that carried the lading from car No. 2667 to Bakersfield and San Francisco and other points, if any. They were my employees who drove the trucks. There were reports that came to me in the regular course of business as to the condition of the lading that I am testifying to.

The Court: Objection overruled. It wouldn't make the evidence inadmissible. It goes to the weight of the evidence.

Mr. Welsh: Please tell me, Mr. Belyea, where you received the information which you just recently testified to as to the Merchants Ice and Cold Storage reaction to the car, to the truck load when it arrived up north.

The Witness: Well, from two sources. One was the driver that made the delivery and one was Mr. Burt who was the agent for Gouley-Burcham Company.

(Testimony of Jack Belyea.)

Mr. Allen: I renew the objection. The conversation by the man who received the merchandise, the report made to his agent is hearsay and what his agent might report to him, that is another matter again.

The Court: You are correct on that.

Mr. Welsh: He received the information.

The Court: He received it from somebody other than his agent.

Mr. Welsh: He received it from his agent, too.

The Court: The court has ruled. The report he received from his agent is permissible, but not reports received from other parties who were not his agents. That is the ruling of the court.

Mr. Welsh: Please tell me, Mr. Belyea, only what information you received from your agent, namely, the truck driver, concerning the attitude of the Merchants Ice & Cold Storage Company in San Francisco toward taking the shipment into their warehouse? Only what information you received from your agent, the truck driver.

The Witness: He told me that Merchants would not accept the merchandise by only taking exception on some of the soft cases. There were approximately forty soft cases and the only way that they would accept the merchandise was to take exception on the total amount of cases. I remember that I first went down to the Bay Street team track to look at Car ERDX 2667 on the afternoon of the 10th or the 11th and I wouldn't swear to the day

(Testimony of Jack Belyea.)

I wouldn't know whether it was the 10th or the 11th, whatever day was Thursday. Thursday seems to spring in my mind. The following day the first 500 cases had to be unloaded that night at Bakersfield and I contacted the consignee in Bakersfield to be sure they would receive it. It is not possible that I went down to look at the car on the 10th which was a Wednesday and unloaded the car on the 11th which was a Thursday. The car was unloaded the same day that I got the first look at the merchandise. My employees accompanied me when I went down to the car for the first time. They were standing by ready to go to work. They were right there with me. There was no representative from the railroad with me. I had to go up to the office or send up to the office after him. The car was opened before Ned Holman got there. I broke the seal. It is not customary for me to break the seal on the car without getting permission first. I had already signed for the car. I signed a freight delivery receipt. I had a copy of the freight delivery receipt but I do not have it with me.

(The freight receipt was marked Defendant's Exhibit A for identification.)

The distance traveled from the time I unloaded the shrimp here in question from [30] the car until it was delivered to the plaintiff is as follows: The first 450 cases moved approximately three-quarters of a mile. The other 50 cases that came off in Los Angeles moved approximately four miles. My name appears on Defendants' Exhibit A for identifica-

(Testimony of Jack Belyea.)

tion. That is my signature. That is the freight receipt to which I referred. I signed it prior to the time I looked at the lading in the car. The receipt is not in the same condition as it was on the day that I signed it. There is an addition here. When I say there is an addition here, I refer to the words "No exceptions reported." Those words were not there when I signed it. Other than that, everything else is as it was when I signed it. At that time I was operating both as a common carrier and a contract carrier. At the time I had a certificate granted by the Interstate Commerce Commission It was a wartime measure. It gave me also intrastate rights in the State of California. I could run to all points within the State of California if I recall the scope of the certificate. I was regulated by both the Public Utilities Commission of the State of California which is probably the railroad commission and also by the Interstate Commerce Commission of the United States. I was required to keep certain records under the regulations of those two commissions. I believe that I should have records to indicate the day I picked up the commodities contained in car ERDX-2667. Our carriage commenced in Los Angeles. I imagine I have records available telling the date upon which I picked up the lading that was contained in that car. I do not have those records with me at present. It is customary for me to refuse a shipment if it is in bad order as one might say, but under the circum-

(Testimony of Jack Belyea.)

stances where the time element was involved, for the best interests of everyone concerned, the object was to expedite the movement of that merchandise to where it wouldn't only protect Hamilton Foods, but it would protect the Santa Fe and also myself. I was aware of my duties to the public as a common carrier at that time. I recognized the responsibility I took upon myself [31] when I put a load of commodities in my truck. It is my testimony that I did not give any of the soft cartons to Mr Dominis of Pic'N'Time. He got no soft cartons whatsoever. He got only hard cartons. I put some of the soft cartons in my truck. In other words you took it upon yourself to bear that responsibility.

Mr. Allen: Just a second. I will object to that as placing a legal or calling for a legal conclusion.

The Court: Sustained. That is carying it too far.

The Witness: The fact is that I did put some of the soft cartons in my car. As to the rest of them, Gaydens, Incorporated, got a few soft cartons in their 50-case shipment. I would estimate that there were between 25 and 40 cartons that were offff condition at the time. The balance of the car gave signs of breaking down. You could see a condition of defrosting starting to take place in all of it. Mainly I saw the soft cartons near the doorway. Ice bunkers in a refrigerated car are at the two extreme ends as you have pictured here. In the particular type of car you have pictured that is

(Testimony of Jack Belyea.)

correct. There are other types of bunkers. It is also true that no matter how well a door may be insulaed, it is the weakest portion of a wall and it would be the weakest portion of a side of a car The icy refrigerant that emanates from the bunkers goes from the two extreme ends toward the center and meets around the door, the two currents The air temperature around the door would be higher—it would be cooler as you dropped toward the bunkers and warmer as you got near the door

Q. Isn't it pretty common when you open up a refrigerator car that has come all the way from Chicago to Los Angeles, that around the doorway there is a sign of some defrosting?

The Witness: Not necessarily.

Q. Well, it happens, doesn't it, with some regularity?

The Witness: I have seen it on a few occasions

Q. And the fact that it is beginning to defrost does not [32] indicate that it is rotten or spoiled, does it?

The Witness: Well, it all depends on the condition of the defrosting. There is difference in opinions as to the difference between a defrosted case and one that is already wet.

Q. I understand your testimony was, I believe, that you could put your finger through them?

The Witness: That is right.

Q. But if they were just a litle defrosted that

(Testimony of Jack Belyea.)

wouldn't indicate that the lading was in bad shape would it?

The Witness: No, it would indicate that it was starting to break down.

Q. But if it were put right under refrigeration in all likelihood there would be no danger of damage, isn't that right.

Mr. Allen: Just a second, if your Honor please. This witness has not been qualified as an expert on this particular food, as to what damage would happen and whether or not the placing of it under immediate freezing would or would not correct the condition.

The Court: Objection sustained. That is calling for an opinion and he has not been qualified to express an opinion.

The Witness: The question of whether signs of defrosting indicate whether or not the lading has ben damaged depends upon the commodiyt. Some are more perishable than others. I have tasted shrimp creole. I would be inclined to handle shrimp creole a little more carefully than some other items

Q. You think it may be a little more perishable?

The Witness: Well, there have been very little of it in this town. Until you know how much abuse the commodity would stand I would certainly give it the utmost of my attention to see that it properly got there in the right condition.

Q. Did you receive any complaint from anyone

(Testimony of Jack Belyea.)

in Los Angeles to whom you delivered the cartons of this frozen shrimp?

The Witness: From Gaydens I had heard some reports on the [33] matter, that there were some soft packages and they objected to it. They did not file a claim. They objected to putting the merchandise out to the trade, re-freezing it and putting it out. They were dubious about the condition. They filed no claim because they didn't get too many packages of it and they didn't feel it was such a substantial amount that would warrant filing a claim. They found actual damage in the commodity itself. I am basing my statements upon what they told me. I got the thermometer from Marshall-Anderson Company. They are located about a block away from the Team Track. The thermometer is 12 inches long. 12 or 14 inches. I got it from the man in charge of Marshall-Anderson. It was a regular Fahrenheit thermometer. He went into their vegetable cooler and got it, got the thermometer. I didn't make any test on the thermometer, I assumed of course that it was a proper thermometer. It was operating and it was in a cooler at the time. I made no specific test as to its degree of accuracy. I testified that I stuck my finger through one of the cartons. One of them was broken after I opened the door and made the inspection. It is true that in any refrigerated place, whether it be an icebox, a truck of a railroad refrigerator car, that the lading may be colder than the air sur-

(Testimony of Jack Belyea.)

rounding it. I had already put a hole in one of the cartons, but I didn't put the thermometer right into the lading because it wasn't that kind of a thermometer. The thermometer had a wooden stand on the back where the graduations were, a plaque, or whatever you care to refer to it as, and if I had put that in it would have meant putting a hole through the cartons of approximately that wide. Rather than put a hole through the carton that wide I took the air temperature above and the air temperature below. My truck left Los Angeles for points north with the lading that arrived on Car ERDX-2667, the same night it was loaded. I believe that my car with the lading from Car ERDX-2667 arrived in San Francisco on Saturday morning. It was the Saturday after the Thursday. It stopped en route at [34] Bakersfield and Sacramento. If I recall, I believe those were the only two stops. It went from Bakersfield up to Sacramento and went back down to San Francisco. We left 50 cartons off at Bakersfield. They left some at Sacramento. I don't recall. It was a small amount. The route was up the San Joaquin Valley I believe it was Highway No. 99. It would be a route that would be directly from Bakersfield to Sacramento. I added dry ice as the truck went up north because, if I recall, it got in too late, into San Francisco, to unload and I believe the truck returned down to San Jose where he could secure dry ice. There wasn't any in San Francisco at the

(Testimony of Jack Belyea.)

time and he returned down to San Jose to get sufficient ice to re-ice the commodity to insure the arrival of it. I believe that Saturday, April 13, the truck having made two stops, at Bakersfield and Sacramento, the car was tendered to the storage people for unloading. It was just overnight up there having made the two stops. I believe the car was tendered to the storage people for unloading on Saturday, the 13th. I haven't any idea of what time it was. I have records on all of these different things, but I didn't bring them with me. I believe it was Saturday morning, the 13th, that they refused to accept the carload of frozen shrimp.

Q. Then what, if anything, did your men do after the Merchants Ice & Cold Storage Company refused to take in the lading?

The Witness: I know that my men re-iced it because I have the bill to support that, in San Jose. Merchants finally accepted it by taking an exception on the commodity. I don't remember what date it was. I don't recall when the truckload of shrimp in San Francisco was actually unloaded into some warehouse. It is almost two years ago I would have to check my records to state that. It is my testimony, however, that the Merchants Ice & Cold Storage Company wouldn't accept it until they cleared themselves by stating they refused to accept responsibility for it. In other words, putting an exception on the receipt, and my question was then, [35] "could that have been the day which

(Testimony of Jack Belyea.)

hey received the goods and the day that they
laced their notice of exception on the receipt on
April 17th?"

Mr. Allen: The witness has already testified as
o that. I will object to that. The witness has just
estified that he cannot remember the exact date.

The Court: He can answer the question he is
sked about the two dates.

Mr. Allen: I object to that on the ground that
t is calling for a hypothetical question. He is ask-
ng could it have been. He is not asking for a
positive statement of what happened. He says,
'Could it have been?" Well, it could have and it
could not have.

The Court: Yes, objection sustained. The ques-
ion is, what was done?

The Witness: I acted on behalf of the con-
signee, Gouley-Burcham Company, in unloading the
car. Mr. Lloyd J. Smith gave me authority on be-
half of Gouley-Burcham Company. He is no longer
here but at the time he was in charge of the frozen
food division of Gouley-Burcham. I do not recall
ever writing a letter to Santa Fe Railroad Com-
pany and telling them that I was representing
Gouley-Burcham Company in connection with this
car. I didn't have any knowledge of whether or
not Gouley-Burcham Company ever wrote such a
letter to the Santa Fe Railroad Company.

Q. What financial arrangements did you have
if any, with the shippers, Hamilton Foods Com-

(Testimony of Jack Belyea.)

pany, or the consignee, Gouley-Burcham Company

Mr. Allen: Just a second. I will object as being wholly immaterial and irrelevant. It has nothing to do with the issues of this case, whether he was paid $1.00 or $1,000.00. It wouldn't be materia at all.

Mr. Welsh: I don't want to know how much he received, but I want to know whether he was paid only for his services as a common [36] carrier or whether he was also paid for performing services as an agent.

The Court: You may answer the question.

The Witness: I was paid for performing the services of a common carrier and none for services as an agent. I stated on direct examination that the bunkers were half-full of ice when I examined them. I recall having a conversation with you over the telephone the other day.

Q. And did I understand you correctly when you said that you thought the bunkers were three-quarters full of ice upon examination?

A. Between half and three-quarters, yes. They were not full.

Q. Not full.

A. No. The best way to describe how the car was unloaded would be to draw it on the board. There were two positions. We loaded the front piece of equipment through the side door. There is a side door in the side of the truck, a small opening, and we pulled the equipment up where we got

(Testimony of Jack Belyea.)

back past the door. We moved the equipment up and loaded it through the back door. The refrigerator doors on the railroad car were necessarily always open during a loading operation. I would say it took us 40 to 45 minutes to load the truck that went up north. If I recall, it was between two and two-thirty in the afternoon that we started to load. I know there was a lapse of time between moving the merchandise that was destined for Los Angeles—there was a lapse of time in which the car was shut up and waiting arrival of the line haul truck to transport the balance that was in the car. We had either three or four men working and loading the truck. I did have some kind of device or facilities to load the truck. We used conveyor rollers there at the start and until we had to make a curve and then not having a curve we had to place a man in between the sections of the rollers to throw the [37] cartons from one roller onto the other. We did not take the lading out of the car onto a dock and then from the dock onto the truck. Absolutely not. It went directly from the car onto the truck. I would estimate it took about 45 minutes if I recall correctly—it was 40 to 45 minutes. I did not request the railroad company or any employee of the railroad company to further [37A] ice the bunkers in the car when I first examined the car. I did have a conversation with Mr. Holman concerning the ice in the bunkers. I mentioned that the car was quite warm and that there

(Testimony of Jack Belyea.)

was something radically wrong; that we shouldn't have a temperature like that. After I initially examined the car, I got Mr. Dominis and he agreed to take the hard cartons. After the truck was loaded, on Thursday, the 11th of April, the truck headed north for Bakersfield, Sacramento and San Francisco. The other merchandise in the truck besides the shrimp from the car was cauliflower and broccoli. The cauliflower and broccoli were going to Sacramento. There was shrimp creole also destined for Sacramento. I don't recall what else the truck may have had, but I believe that the cauliflower and broccoli were the extent of it. That pretty nearly made a truck load. I don't know what tariff we were operating under. It may have been Highway Common Carrier Tariff No. 2, but I don't recall. Yes, it was Highway Carrier Tariff No. 2. On direct examination I testified that I had four inches of spun glass insulation. It was located in the sides of the equipment and there was six inches of cork in the floor and six inches of spun glass in the roof. Cork in the floor and spun glass in the roof and spun glass in the sides. The doorways were insulated the same way. That was the only insulation excepting that there were various racks and so forth. By racks, I mean stripping built on the floor and on the sides. That is the same kind of stripping we were talking about before. I believe the car was spotted on the 10th of April, but I know it was the afternoon of either the 10th or

(Testimony of Jack Belyea.)

the 11th, I don't know which day it was, I still can't recall whether it was the 10th or the 11th. The shrimp creole itself was not actually examined in Los Angeles to determine whether or not it was fit for human consumption. There were no samples submitted to any laboratory or the United States Department of Agriculture to determine whether they were or were not. To my knowledge there were no [38] claims made by the Los Angeles consignees. I didn't call for an inspector from the United States Department of Agriculture when I opened the car door because we were working against time.

Q. But you are aware of the practice of calling such an inspector when one feels that a car did not arrive in proper condition.

Mr. Allen: Just a second. I object to that as being argumentative.

The Court: He is asking whether he is aware of the custom.

Mr. Welsh: Business practice.

The Court: Go ahead. Objection overruled.

Mr. Welsh: You are aware of that custom, aren't you, sir?

The Witness: It all depends on whether it comes under the jurisdiction of the United States Department of Agriculture. I know of the perishable freight inspection agency that the railroad has. I know it is a business custom to ask for an inspection by those people where there is any doubt

(Testimony of Jack Belyea.)

as to the lading at destination. I asked Mr. Holman to call for an inspector, for an inspection, and never got an inspector down there. I asked Mr. Holman for a mechanical inspection, also an inspection of the merchandise in the car. I would say that I made such request between 30 and 40 minutes after we found the initial—after the initial opening of the car. We did not get such an inspection. That very same evening we put the lading on our truck so as to save time and the possibility of losing it. When I looked at the car the first time upon arriving, at the team track, the seals were on the car. I don't recall the numbers of those seals. I don't remember if the letters "F.M.C." were on the seals, but I believe they were. It wasn't a regular Santa Fe or Chicago, Wilwaukee, St. Paul seal. It looked like a seal of someone besides the railroad. First, upon arrival at the perishable Team Track, I went to Ned Holman's office, signed the freight delivery receipt, Exhibit A for identification, and after signing that document [39] went down to the track to the car itself. I opened up the car, looked at it and sent for Ned Holman when I saw the soft packages in the doorway. I signed for the car before I looked at it. You have to. That is the procedure that is followed. You don't get to open the car until you sign for it.

(Testimony of Jack Belyea.)

(Trial resumed following day.)

Upon checking my records last evening, I find that 100 cases were consigned to Gaydens, 450 cases to Dominis, or a total of 550 cases in Los Angeles.

Q. And of those 100 cases to Gaydens, I believe you testified that they were representative cases of the whole carload. In other words, some of the soft cases were in that group?

A. There were a few, yes. I have examined my own records and I am definitely certain that I first went down to the Team Track to look at the railroad car on the 11th of April. I have two of the freight bills. However, the three in question, in San Francisco, my attorney has them and I was unable to secure them for this morning. I do not have the records as to the delivery in San Francisco. Mr. Gold has them.

Redirect Examination

By Mr. Allen:

My truck returned from San Francisco during the following week, but I wouldn't know the exact date. It picked up merchandise on the way back. The other merchandise which was in my truck that went to Sacramento and Bakersfield and Fresno and San Francisco arrived in those cities in good condition.

Mr. Welsh: What do you mean by "other merchandise?"

Mr. Allen: You brought out on cross-examina-

(Testimony of Jack Belyea.)

tion yesterday, Mr. Welsh, about the broccoli and cauliflower.

Mr. Welsh: Oh, you mean the broccoli and cauliflower.

Mr. Allen: That is right, the other merchandise carried in his truck.

Mr. Welsh: I don't see how that is relevant to this case, your [40] Honor, and I object to it on that ground.

The Court: Objection sustained.

Mr. Allen: The materiality is this. If the other merchandise, perishable merchandise carried in this same truck, went to San [40A] Francisco and Sacramento and arrived in the same truck in good condition then we can throw out all the testimony as to how hot the San Joaquin Valley was.

The Court: If it is for that purpose I will allow him to answer.

The Witness: Yes; it was received in good condition at Bakersfield and Sacramento.

Mr. Allen: Mr. Welsh asked you or implied that the purpose of your taking this merchandise in the condition you found it was due to the fact that you wanted to save some time. Will you tell the Court at this time why you moved this merchandise from the freight car in that condition?

The Witness: Well, there was no other place to put it. I couldn't leave it in the car. There was no storage available. I couldn't leave it set there and rot. So the reason that I moved this merchandise

(Testimony of Jack Belyea.)

from the car was not the saving of time but was for the purpose of avoiding the merchandise from spoiling right there in the car, not having any place to move it. And because of that, I took it upon myself to move this merchandise which would go completely to waste and tried to save what I could. Mr. Holman did not get a thermometer of his own. Mr. Holman did not punch a hole through the package nor did he push the thermometer into the package to see what the temperature of the merchandise in the package was. To my knowledge, at no time did Mr. Holman question the accurateness of the thermometer. I received money for hauling the merchandise in Los Angeles and I received payment on the merchandise that went to Sacramento, but I received no payment for the merchandise that went to Bakersfield or the various consignees in San Francisco. To this day I have not been paid for the hauling of the merchandise to Bakersfield or San Francisco. I would consider the boards on which the merchandise was stacked as stripping. There was ventilation underneath the merchandise. I [41] believe the merchandise in the car was stacked three high throughout the car. It might have been four high on the bunker ends. I would say the packages were probably 14 by 14 and from eight to ten inches high. The packages being eight to ten inches high and this merchandise being stacked three boxes or four tiers high on the outside, I would estimate that it was three to three

(Testimony of Jack Belyea.)

and one-half feet in height. The rest of the car was empty. I believe that the car is eight feet high inside. Five of the eight feet was ventilation space. The purpose of stripping a car is when a car is filled it can get some circulation through the car, that is, where it is solidly packed, they put these strips along the wall to permit air to get around the packages.

Q. But in this particular car almost the entire car or at least two-thirds of the car was empty and had available space for ventilation, isn't that correct?

Mr. Welsh: Your Honor, we object to the leading question on redirect examination.

The Court: Sustained.

Mr. Allen: If your Honor please, this witness is not our witness. He is called under the rule of cross-examination which apply to a defendant called under the rule. We have not made him our witness. He is a party defendant and he is being examined under the rule, and the rule of cross-examination applies to a witness called under the rule.

The Court: He may answer.

The Witness: It is a matter of opinion. I feel that it should be stripped as a reassurance that it would get proper ventilation. There was ventilation in all the rest, of the top of the car. The only question involved would be the three feet, or three feet some inches from the top of the packages to

(Testimony of Jack Belyea.)

the floor. Underneath the packages it was stripped. Those are permanent floor racks. [42]

TESTIMONY OF ALICE EDDELMANN

on behalf of the Plaintiff.

Direct Examination

By Albert H. Allen:

My name is Alice Eddelmann. I have charge of all the accounting and records of the Gouley-Burcham Company, who are food brokers. They were the consignees of the merchandise involved in this lawsuit. We received four or five carloads of merchandise from the Hamilton Foods Company. Not less than four. All of them came in good condition except this one. To my knowledge we did not receive any formal written notice from the Santa Fe Railway Company as to the arrival of this car. The way we keep our records the card would be in this file if we received one. I have all of the 1946 records and I have gone through all of those records but have been unable to find that card. I received only one card on all of the shipments we received. Sometimes we receive notification by telephone from Santa Fe that the car is arriving. But not in this particular instance because we have cars coming in from all over the country and we have offices in different places and if it is a stopover car sometimes they call and give us the information where the car is so we can notify our offices, so they can arrange for warehouse storage space. Our business practice is that when we have notice that a car

(Testimony of Alice Eddelmann.)

of perishable foods is coming in the packer usually sends us a wire giving us the shipping date, the car number, and so forth, as the food storage space is very limited here and it is hard to get space, so we have to make arrangements for storage space, if it is going into storage. If it is directly shipped from the car, we contact frozen food trucks and they follow through when it arrives here, so they can unload it immediately. We request the truck that is to carry the merchandise further to contact the railroad company to find out when the car is going to arrive and we also, if it goes in storage, we contact the warehouse and they follow through. In this case we received a telegram that the merchandise was being [43] shipped. The telegram was dated April 1, 1946 and we received it at 10:30 a.m. in the morning. It concerned Car ERDX 2667. This is the time when the telegram was sent. There is a difference in time so it gets here before it is sent, really. That is when it arrived at our office. It was sent from Chicago at 11:04 a.m. and it reached us at 10:30 a.m. It reads: "Car ERDX 2667, Santa Fe, shipped April 1st," and signed "Hamilton Foods, Incorporated." I didn't notify Mr. Belyea, but Mr. Smith, who was in charge of our office at the time, in charge of our frozen food department, called him on the telephone advising him to look out for the car. That is our usual procedure as soon as we get the telegram, to follow through on that.

(Testimony of Alice Eddelmann.)

Cross Examination

By Mr. Welsh:

(Defendant's Exhibit B was then marked for identification.)

The Witness: I do not remember receiving the copy of Defendant's Exhibit B. This exhibit indicates that it is a notice sent to Gouley-Burcham Company, 1848 East Vernon Avenue, indicating that Car No. ERDX 2667 is at the Bay Street Team Track. I received only one card and that was on Car No. 7979 and that is the only card of all the cars that have been shipped. We always attach the cards to the order in the order that they are received. They send us a telegram and then we get the card and put it right in the file, right with the thing. It may have been lost in the mail but to my knowledge I never received it. And here is where we called Jack Belyea. That is on the one car. We always mark the record accordingly because of the perishable merchandise. I do not remember whether we were notified by telephone by Santa Fe about the car, unless they talked to Mr. Smith and I said before, he left us almost two years ago. They may have spoken to Mr. Smith rather than myself, but I usually take all those calls, but if I should be out to lunch or something they may have talked to him. I don't know of any call. [44]

TESTIMONY OF RAYMOND C. SPOELSTRA

a witness on behalf of the Plaintiff.

Direct Examination

By Albert H. Allen:

I am part owner of the Food Service Laboratory, which is the laboratory set up to do analytical work for food processors, chemical and bacteriological. I graduated from the University of Colorado and did post graduate work at the University of Chicago, in 1934. I received a Bachelor of Science Degree from the University of Colorado and did post graduate work at the University of Chicago. I did not receive a degree although I did two years of post graduate work at the University of Chicago. It consisted of bacteriological work and chemical analyses. Since my post graduate work at the University of Chicago, I have been engaged as a chemist and analyst of frozen food products. I maintain my offices at 4917 Huntington Drive. I am familiar with frozen food products. I never made an analysis of frozen shrimp creole, but I have made an analysis of frozen shrimp. There is no difference between frozen shrimp creole and frozen shrimp as to the perishability of the commodity. From my experience and my analysis, we recommend to our clients, that frozen shrimp, or frozen shrimp creole, should be kept at negative 10 or below—that is 10 degrees below zero or less. Frozen shrimp cannot be kept at a temperature above 20 degrees above zero. Above 20 degrees it starts deteriorating. When you get

(Testimony of Raymond C. Spoelstra.)

over 20 degrees above zero, 25 degrees above zero, you are approaching a very dangerous situation as far as frozen shrimp are concerned. Frozen shrimp kept over 20 or 25 degrees above zero begins to defrost. After it begins to defrost there is a gradual deterioration of the product. That deterioration takes the form of possibly enzymatic action which is natural to the product or possibly bacterial action or some of the normal acids that are present in the fish may begin to work for a gradual breakdown of the product. When a package of shrimp creole appears soft and moist to the point where you can put [45] your finger into the carton, it indicates to me that the product is defrosted and with defrosting of the product it is either ready for immediate use or it is on its way to spoilage.

Q. Now, once a perishable food product, frozen food product such as shrimp creole reaches a temperature of, let us say of above 30 or 35 degrees and it has started to defrost, is it possible to refreeze that food and still have it edible?

A. It is possible to do it but I question very much whether any processor would do it because they are running a terrific risk of putting a product onto the market that is going to be sub-standard.

Q. Now, when a product reaches a temperature of 54 degrees and appears to be soft and in a defrosted condition, can that be re-frozen?

A. It can be re-frozen. I mean—if I get your question correctly, do you mean whether or not it

(Testimony of Raymond C. Spoelstra.)

is possible to re-freeze such a product? If that is what you mean, the product can be re-frozen, but if you mean re-frozen for sale, again you are running a very great risk of having a substandard or a product that when it is finally sold to the consumer will be possibly off flavor or off odor.

Q. Now, is there any danger of poisoning from food which has been standing at 54 degrees and is subsequently re-frozen?

A. There is always danger of the possibility of bacteriological poisoning in any foods. The organisms that are usually responsible for that are staphylorphas. Now, if that organism happens to be present at that particular time, if the product defrosts, warms up, allows the organism to grow and to release its virus there is a very great possibility of poisoning from that organism. At the request of the plaintiff, I caused experiments to be made in the last few days with shrimp. An experiment was made with frozen shrimp. That was a blanched shrimp. Blanching is a process whereby the shrimp is heated to a certain temperature for a certain length of time. I [46] would say there is no difference as far as the defrosting between cooked shrimp product and a product that has been blanched. The experiment I made was as follows: I bought a package of shrimp and put it into the refrigerator. The refrigerator was at negative eight degrees Fahrenheit. I held it in the refrigerator at 40 degrees and at the end of 11 hours it had completely defrosted and it was just running out

(Testimony of Raymond C. Spoelstra.)

of the package. I also conducted an experiment at room temperature in which the product was at zero degrees and held at room temperature which was approximately 70 or 72 degrees and at the end of six hours it was completely defrosted and the juices were running from the package. At the end of six hours in a room of temperature 70 to 72 degrees and a package taken from a temperature of zero, it was running out of the package.

Voir Dire Examination

By Mr. Welsh:

Q. Have you had a great deal of experience with refrigerator cars on railroads?

A. Not with the actual refrigerator car, no.

Q. Do you know what temperatures are possible to be maintained in a car, over what period of time, given certain icing instructions that have been fully carried out?

A. We have seen records of recording graphs in cars that have been shipped from various points throughout the country and we know from having seen those graphs that it is possible to maintain certain temperatures in transit.

Q. Well, do you know how much 13,000 pounds of crushed ice with 30 percent salt—do you know what temperature that would keep the car at if that was maintained at every icing station along the way? A. (No Answer).

Q. In other words, if 13,000 pounds were put in the bunkers in Chicago with 3,900 pounds of salt

(Testimony of Raymond C. Spoelstra.)

on April 1st at 2:15 p.m. and if 3,000 pounds of ice were put in at Savannah, Illinois, with 900 [47] pounds of salt on April 2nd at 5:00 p.m., and if 1,000 pounds of ice with 300 pounds of salt on April 4th at 1:40 a.m. at Kansas City, and 1,000 pounds of ice and 300 pounds of salt on April 4th at 2:05 p.m., in Kansas City were put in, and at Waynoka, 1500 pounds of ice and 450 pounds of salt on April 5th at 6:53 a.m., and at Clovis 600 pounds of ice and 180 pounds of salt on April 5th at 9:10 p.m. and at Belen 600 pounds of ice were put in and 180 pounds of salt on April 6th at 11:35 a.m.; at Winslow, Arizona, 900 pounds of ice and 270 pounds of salt were put in on April 7th at 8:45 a.m. and at Needles, California, 900 pounds of ice and 270 pounds of salt at 10:20 p.m. on April 7th, and at San Bernardino, on April 8th at 7:05 p.m., 1500 pounds of ice and 450 pounds of salt, and the car then came from San Bernardino into Los Angeles. Assuming further that upon arrival at Los Angeles the bunkers were 98 per cent full—

Mr. Allen: Just a second. Just a minute. You are assuming a bit of evidence that is not in the record. There has been no testimony that the bunkers were 98 per cent full. There isn't one iota in this record to include that in a hypothetical question.

Mr. Welsh: Well, the defendant hasn't put on his case yet.

The Court: You are assuming something not in evidence and you should assume no such thing.

(Testimony of Raymond C. Spoelstra.)

Mr. Welsh: Assuming the other facts I have given you. Do you feel that you are qualified to determine what temperatures would be maintained in that car and what the result of the temperature would be if the doors were opened—how fast the temperature would go down and various things of that sort?

A. I don't think that I can qualify as a refrigerator car expert but we do do this in our work. We make recommendations to our clients at which we like to have the cars held during transit and we know that if those temperatures are met that we will not run into any difficulty with our foods.

Q. But you wouldn't know from the questions that Mr. Allen put to [48] you how long the 54-degree temperature would be maintained from the facts that I have given you here, would you? In other words, you wouldn't know whether that 54-degree temperature had been present for five minutes, five hours or 50 hours, would you?

A. No, I couldn't state that definitely.

Mr. Welsh: Then we object to the question, your Honor. We don't feel that the gentleman is qualified to testify as to that particular point.

Mr. Allen: If your Honor please, we have not qualified nor do we propose to qualify this gentleman as an expert on refrigerator cars. The question went not to what temperature the car would be maintained at. That isn't the question. That is something for the defense to raise.

(Testimony of Raymond C. Spoelstra.)

What we want to know is, and what we have asked, and I think it is a perfectly proper question, assuming that the facts which have been introduced into evidence in this case so far were present and he found that the merchandise was at 54 degrees, whether that could be re-frozen to be used in the trade. Now, whether or not it was at 54 degrees for one hour or ten hours or what caused it to get that way is something else that we will argue when the defense puts on its case. All we want to know of this witness, and he is qualified to testify, if he finds a frozen food product at 54 degrees, whether it can be re-frozen for the trade.

Mr. Welsh: Is it your question that the product is as 54 degrees?

Mr. Allen: No, the temperature of the car.

Mr. Welsh: That is why I object, because there is no indication of what the temperature of the product is and the gentleman admits he is not an expert in determining how fast the temperature would raise, under what circumstances, and all of the assumptions that have been made are irrelevant.

But if Mr. Allen wants to ask him specific questions about the [48-A] commodity in a room temperature of 54 degrees for a certain period of time, we have no objection to that. We know the gentleman is completely qualified to answer a question of that sort.

Mr. Allen: We are merely asking him at this time, if your Honor please, that the condition in which the product was found, if that product could

(Testimony of Raymond C. Spoelstra.)

have been re-frozen and sold to the trade and he is qualified to testify on that point. He is an expert witness on that point and he has made experiments and he can testify.

Mr. Welsh: The air temperature was 54 and not the product, and one must know how long the commodity was exposed to the 54-degree temperature before being able to answer that question.

Mr. Allen: That is a question of the weight of the evidence and other testimony that the defense may put in, but I think it is a perfectly proper hypothetical question that took in every fact in this case.

The Court: Objection overruled. He may answer. It goes to the weight of his evidence, because counsel is relating what has been offered in evidence in his question.

What do you say to that?

The Witness: I am trying to remember the import of the question. May I have the last part of that question?

(Question read.)

Mr. Welsh: We object. He has not asked the witness whether or not he has an opinion, first.

Q. (By Mr. Allen): Do you have an opinion as to that?

A. It would be my opinion that the product should not be re-frozen.

The Court: Should not, but he asked you could

(Testimony of Raymond C. Spoelstra.)

it be and not whether it should not. The question is, could it be? That is your question.

Q. (By Mr. Allen): Could it be re-frozen and sold to the public [48B] as a first quality product?

A. I think not.

Mr. Allen: You may cross-examine.

Cross-Examination

By Mr. Welsh:

If a package of frozen shrimp taken below 25 degrees Fahrenheit was exposed to a temperature of 54 degrees for one minute the frozen [48C] shrimp would not be unsuitable for human consumption. If left there for five minutes it would not be unsuitable for human consumption. Left at a temperature of 54 degrees it would defrost in approximately 12 hours. That is completely defrost. At that time it is fit for human consumption, but if it had to be refrozen again, which might take another 24 hours, and then defrosted again, I would say it would not be fit for human consumption. The probability of refreezing it and it being fit for human consumption are against it. I never made any experiments with frozen shrimp creole that had already been cooked in a creole sauce. There is a chemical change of some sort that takes place in shrimp when it is thoroughly cooked from what it was before it was cooked. The chemical change that takes place after thorough cooking is not the same as the chemical change that takes place after blanching. The experiments I made on

(Testimony of Raymond C. Spoelstra.)

blanched shrimp is not on the identical type of shrimp which we are discussing in this lawsuit.

Mr. Welsh: Your Honor, I ask that the witness' testimony as to his experiments on blanched shrimp be stricken, inasmuch as they do not conform to the shrimp in this case. In other words, the experimental evidence—there is no showing that the chemical contents conform to the chemical content of the shrimp we have here.

Mr. Allen: I have gone into the question very thoroughly with the witness as to what the difference is between the two products, whether they are similar, whether the reaction is the same and whether the change in chemical reaction takes place on the frozen shrimp and this witness testified that they are identical. He testified that the effect of frosting and defrosting and freezing on a blanched shrimp would be the same as it would be on a shrimp creole.

The Court: What do you say as to that? Would they be the same?

The Witness: The actual overall effect would be the same. Now, the actual chemical change that takes place is a change in the protein of the shrimp. An uncooked protein is a little different than a cooked protein [49] but the overall effect is going to be very little as far as defrosting is concerned.

The Court: Motion overruled.

The Witness: As a matter of fact, the cooking of the product—once a product is cooked it is more

(Testimony of Raymond C. Spoelstra.)

predisposed to spoilage than an uncooked product

The Court: Motion overruled. Go ahead. The motion is denied.

(The bill of lading was then admitted in evidence as Plaintiff's Exhibit 5.)

(Defendant's Exhibit A was then admitted in evidence on offer by the plaintiff.)

Mr. Allen: We have stipulated as to the value of the product and so it will not be necessary to introduce any evidence on that point.

The plaintiff rests.

The Court: Very well.

(The defendant then had marked for identification the tariff regulations of the Interstate Commerce Commission which said exhibit was marked Defendant's Exhibit C for identification.)

The Court: Are you offering defendant's Exhibit C for identification in evidence?

Mr. Welsh: Yes, we will offer in evidence, your Honor.

The Court: It is admitted.

(Defendant's Exhibit C was then admitted in evidence.) [50]

TESTIMONY OF C. A. MULVIHILL

a witness on behalf of the defendant.

Direct Examination

By Mr. Welsh:

My name is C. A. Mulvihill and I am assistant manager of the Santa Fe Refrigerator Depart-

(Testimony of C. A. Mulvihill.)

ment. I have been assistant manager about a year and a quarter. The Santa Fe Refrigeration Department is a part of the Atchison, Topeka & Santa Fe Railway Company. I have been with Santa Fe since 1926. I was with the refrigeration department from 1926 to 1937 and then this last year and a quarter. The Coast Lines west of Albuquerque on the Santa Fe System are under my jurisdiction and in my territory as assistant manager. It includes the territory that Santa Fe serves west of Albuquerque, New Mexico, and including San Francisco. The employees in the refrigeration department on the Coast Lines are under my direct control and supervision. There are certain records that are kept in the ordinary course of business indicating the arrival of cars, the percentage of ice contained in the bunkers, and such information. I have the records with me indicating the arrival of car ERDX 2667 in Los Angeles on or about April 9, 1946. The record which I hold in my hand is the inspector's daily book, daily inspection book. The book contains a full record of the waybill reference under which each car is moving and a record of the inspection; the condition of the ice in the bunkers and the position of the vents and such. The employees who keep those records are under my control and direct supervision. During the time I have been with Santa Fe I have had experience in the examination of refrigerated cars. I have seen thousands of them. From the records I have in my

(Testimony of C. A. Mulvihill.)

hand now I can tell you that the records indicate the car ERDX 2667 arrived in Los Angeles and the date of its arrival. It arrived in C.S.X. That is the symbol for a train moving from Barstow California. It arrived at 3:40 a.m. on the 9th. The bunkers were inspected at that time. At that time the [51] bunkers indicated 98 per cent full. The next entry I have concerning the car ERDX 2667 is a carry over record from the business of the 9th to the business of the 10th. It shows the bunkers 85 per cent full at 8:00 a.m. on the 10th. The record indicates that the car at that time was on the Bay Street Team Track at 8:00 a.m. on the 10th. That means that at the time the bunkers were inspected at 8:00 a.m. on the 10th they were 85 per cent full of ice.

Cross-Examination

By Mr. Allen:

The entries made in the book which I was reading from were made by the inspector, the R. D. Inspectors. The records are made in that particular book at that particular time. They are not transposed onto that book from some other sheet of record. This book is a book of original record, and it is made by the man who makes the inspection. The record does not indicate at which particular spur track or which particular track of the Bay Street Team Track, Perishable Team Track the car was deposited. You could not tell from that

(Testimony of C. A. Mulvihill.)

record where on the Bay Street Team Perishable Track the car stood.

Redirect Examination

By Mr. Welsh:

There are no tracks on the Bay Street Team Track which are inaccessible to unloading by trucks. They are all available to access by trucks. A truck can back up to any one of the tracks and unload a car. The temperature around the door of the car would be a little bit higher than the temperature at the end of the car. The reason for this is that there is a break in the structure there, the normal insulation, and the car construction is broken there to give access to the interior through the doors and to the extent that that is broken then it is weaker in retaining the refrigerant than is the other section of the car. I am familiar with the customs and business practices of the railroad company and consignees when a car is [52] thought to be bad order or the contents thought to be in bad order by a consignee. As a rule, inspection is immediately demanded by an independent inspection service. In Los Angeles we use the Department of Agriculture to make an independent inspection. If a complaint is registered we also make our own inspection. I am familiar with the schedule which the Santa Fe maintains between Kansas City and Los Angeles, the time schedule to shippers. Our time schedule between Kansas City and Los Angeles is delivery the 6th morning, that is delivery to

(Testimony of C. A. Mulvihill.)

the shipper. That means if a car left Kansas City April 4th, it should be ready for the shipper on the 10th, the morning of the 10th.

Q. And are you familiar with the schedule we advertise for shipments to Chicago?

Mr. Allen: If your Honor please, I don't want to interrupt counsel's examination, but there is no dispute that the car arrived here within the period of time or even a shorter period of time.

The Court: Well, he has a right to question his witness whether there is a dispute or not.

Mr. Allen: We have stipulated the car did arrive in that period of time. There is no purpose in the stipulation if he is going to examine the witness about it.

Q. (By Mr. Welsh): How about delivery to the shippers? Is that stipulated to?

The Court: Go ahead.

Mr. Allen: No.

The Court: Go ahead and examine the witness.

The Court: You don't stipulate to everything.

Q. (By Mr. Welsh): When we make a connection at Kansas City with another road, such as the Milwaukee Road, what is the schedule we advertise to the shipper for delivery in Los Angeles from Chicago, via the Milwaukee Road to Kansas City and via Kansas City to Los Angeles? [53]

Mr. Allen: I object to that as immaterial and irrelevant and has nothing to do with the issues in this case—what they advertised.

(Testimony of C. A. Mulvihill.)

The Court: Overruled.

The Witness: Seventh morning. That means delivery on the seventh morning.

Q. When a car that left on April 2nd from Chicago would arrive, if it kept that advertised schedule, at what time in Los Angeles?

Mr. Allen: I object to that as being wholly immaterial and irrelevant and not within the issues of this case.

The Court: Objection overruled.

The Witness: On the morning of the 9th.

I know the regular icing stations along the Santa Fe route.

Mr. Allen: We stipulated that this car was iced at all the icing stations, all along the route, up to San Bernardino, and it is in the record and it has been signed and delivered and it is in evidence.

Mr. Welsh: Is Los Angeles a regular icing station, Mr. Mulvihill?

The Witness: On some traffic. Not on destination traffic if the bunkers are three-fourths full on arrival.

San Bernardino is a regular icing station. If a car has been iced in San Bernardino, ice is added in Los Angeles if, on arrival, the bunkers are less than three-fourths full, 75 per cent full, then they are re-iced here to capacity. During my experience with refrigeration, it has been necessary for me to use a thermometer. Thermometers must be given a reasonable amount of car and periodic check so

(Testimony of C. A. Mulvihill.)

they do reflect accurate temperatures. They are apt to be inaccurate if not periodically checked. When a door of a refrigerator car is opened, the refrigerant which represents cold air in the car, pours out of the car very readily. In warm weather it is visible in the form of a heavy fog descending out of the doorway. The outside temperature, the differential between the prevailing temperature outside and that inside would determine how rapidly the temperature of the car would be reduced if the car were 25 degrees above zero at the time the doors were opened. If we assume that the car was open on April 11th in the afternoon, when the high temperature was 88 degrees and the low temperature was 62 degrees and the temperature in the car was 25 degrees above zero before the doors were opened, the temperature would rise up rapidly, the air temperature within the car—the equalizing factor would be very rapid. The commodity temperature of the actual packages would not raise with the same speed. The loss of temperature would be very rapid. The loss of package temperature would be less rapid. There might be considerable difference between the package temperature and the air temperature if the doors were opened. When a car is unloaded at a team track into a truck and the truck is backed up to the car door and it takes 45 minutes to unload the car, the commodity temperature is appreciably increased in the package, but not a very material increase in temperature. [54]

(Testimony of C. A. Mulvihill.)

Q. I wish you would look at Exhibit A, attached to Plaintiff's Exhibit, which indicates the icing record given this car from Chicago and from your knowledge of refrigeration state if you can, whether that record shows proper handling from Chicago to Los Angeles.

Mr. Allen: We have admitted it does.

Mr. Welsh: Then you have admitted we have not been negligent in icing the car through San Bernardino, is that correct?

Mr. Allen: I did not say that. I said we admitted the icing record there—the icing is indicated by the record.

Mr. Welsh: He won't stipulate to lack of negligence so I don't see what is the matter with the question.

The Court: Objection overruled. You may answer.

The Witness: It looks like a fairly normal icing record.

Q. (By Mr. Welsh): Would that record indicate that the temperature being maintained in the car was good, bad, or high or what? How would you phrase it, sir?

A. I would say it was quite ordinary and quite average.

Q. It was the run of the mine?

A. At that time of the year the consumption was very normal.

(Testimony of C. A. Mulvihill.)

The Court: Between what points do you say that was?

The Witness: That was from Chicago to San Bernardino.

The Court: Go ahead.

Q. (By Mr. Welsh): On the record which you refer to do they indicate the condition of the bunkers and vents on April 10th? A. Yes, sir.

Q. And April 9th? A. Yes, sir.

Q. 1946?

A. Yes. The vents were closed and the plugs were in.

Q. On both dates? A. Yes, sir. [55]

Recross-Examination

By Mr. Allen:

You misunderstood me when I stated that there is no place at the Bay Street Perishable Team Track where cars are not available to the street for opening. I said that the Bay Street Team Track where cars are normally delivered are available to, accessible to trucks. There are lead tracks in there on which stuff is not delivered but are a part of the Bay Street facilities. It is a fact that at the Bay Street Team Track, where the street comes down here, there is one set of tracks, and then there is one set of tracks that comes to a termination and goes to a spur and another set of tracks which comes down on the other side and a third set of tracks which comes down on still the

(Testimony of C. A. Mulvihill.)

other side, so that the tracks on each outside are available for opening.

Q. So that it is possible to have a car on the Bay Street Team Track which is not available for trucks to unload, is that not correct?

Mr. Welsh: Please do not argue with the witness.

Mr. Allen: I am not arguing with the witness. I am asking him a question.

The Court: He may answer.

The Witness: I would say with the exception of the leads there that the facilities generally is available to trucks.

Mr. Allen: Mr. Mulvihill, I am not asking what is generally available. I am asking you if it is not possible to have a car on the inside track which is not available to unloading from either street. Is that not possible? A. It is possible.

Q. As a matter of fact, you have several such tracks, don't you? A. No, I don't believe so.

Q. How many down there do you have like that?

A. I can't say of my own knowledge.

Q. You have at least two, don't you?

A. It is possible. [55A]

Q. If I told you that I examined it last night and found that there were three such tracks would you say I was in error? A. No.

Mr. Welsh: That is pure argument, your Honor.

The Court: Objection sustained. It is argument.

Q. (By Mr. Allen): Now, if a refrigerator car

(Testimony of C. A. Mulvihill.)

were on the center track it would not be possible to unload that car from either side of the Bay Street Track, is that correct?

A. Well, I am afraid my knowledge of that center track that you have reference to there doesn't permit me to make a specific answer to the question.

Q. Would you make an examination at the noon hour? I would be very happy to go with you.

A. I would be glad to. I do not have the record of the inspection in San Bernardino and I do not know how full the ice in the bunkers were in San Bernardino, excepting that the record of the icing shows the amount of ice that was used in replenishing the bunkers.

Mr. Welsh: The record in evidence speaks for itself as to how much ice was put in at San Bernardino.

The Witness: We have no record of any ice that was added from the time the car left San Bernardino to the time it was unloaded in Los Angeles. The record does not indicate any ice being added to that car from the 8th of April until the 11th of April.

Q. How long would it take the temperature in a car that [56] had been properly iced up to San Bernardino to rise in temperature from 20 or 25 degrees to 54 degrees, assuming that the temperature, the outside temperature was a mean temperature of 58 degrees in Los Angeles and 54 degrees

(Testimony of C. A. Mulvihill.)

in San Bernardino on the 8th and 58 degrees in Los Angeles on the 9th and 68 degrees in Los Angeles on the 10th and 75 degrees in Los Angeles on the 11th?

The Witness: Well, I can't say specifically, but it would take quite a long time to rise to that temperature.

Q. In other words, the temperature does not just jump from 25 degrees to 54 degrees, does it?

The Witness: Not if your car is closed.

Q. So that if upon opening the car a thermometer was placed in the car and the thermometer registered 54 degrees you would say that it took some period of time before that temperature rose to 54 degrees, wouldn't you?

The Witness: That is right. If in addition to the thermometer being placed in the back of the car away from the door it was placed underneath the package and that indicated a temperature of 50 degrees, the temperature would reflect the temperature of the packages more than it would the air temperature. Putting the thermometer down in between the packages would not necessarily indicate that the packages were 50 degrees. To get the package temperature, you would have to insert the thermometer in the contents of the package. I don't know whether Mr. Holman has a thermometer, I can't say. I can't say that it is the practice of Santa Fe where a thermometer is put in the car and found to be 54 degrees, to check the thermom-

(Testimony of C. A. Mulvihill.)

eter with a thermometer that the Santa Fe owns to find out whether the thermometer is accurate or not.

Q. Now supposing that the car has been properly iced and kept at low temperature of 20 to 25 degrees, with the packages near the door when the door was opened, of a frozen commodity, be so soft as to be able to put your finger right through the outside [57] container and the inside container as well, into the product?

The Witness: No, not if they had been completely frozen. I would say that if a product was put into a car at 15 degrees below zero the product was properly frozen when it was loaded originally. If we assume that the car was pre-iced and it was iced at regular loading stations up to San Bernardino, I would say it would maintain a freezing condition. From the record of the icing which has been introduced in evidence and which the Santa Fe did in this case, I would say that normally, it should have maintained the cold condition of the car and the frozen condition of the product from the time it left Chicago up until the time it arrived in San Bernardino, but it wouldn't necessarily retain the identical temperature of a commodity when loaded. It would not retain the identical temperature when, that it was loaded at 15 degrees below zero, but it should maintain a freezing temperature which should range below 32 degrees.

Q. If the car was loaded and the product was

(Testimony of C. A. Mulvihill.)

15 degrees below zero and it was put into a car that was pre-cooled, and it was iced by Santa Fe and St. Paul up until it reached San Bernardino, at regular icing stations with the normal procedure, run of the mill icing. That product reached Los Angeles and the cartons visible appeared to be soft and moist—defrosted and you could put your finger into it. Now, I ask you under those conditions would you say the temperature of that car was proper?

The Witness: The condition of the packages wouldn't warrant that temperature if the temperature had been maintained up to the point of inspection. From those facts, I would not say that the defect or default would be from the time of last icing in San Bernardino on the 8th until the car was unloaded on the 11th. It would indicate that there was normal consumption of refrigerant up to San Bernardino. I testified before that that is the normal means of holding the temperature of that car, and that was maintained up [58] until San Bernardino. I couldn't say that if it was maintained in that way until at least it reached San Bernardino that the product should have been in good shape in San Bernardino without my making a definite inspection of the commodity. When a car arrives in San Bernardino and we look at the bunkers and the bunkers are full of ice, we do not break the seal to make an inspection of the product. I did not say that when you opened the door there

(Testimony of C. A. Mulvihill.)

is a blast of cold air or that on a warm day there is a fog in the manner in which you state. There is a rolling discharging action. You can feel the cold air in the car.

Q. Now, if a person opens that car and when he opened the car he didn't see any frost come out and he didn't see any vapor come out and the car appeared warm to him, would you say that the temperature of that car was in the same condition it should have been in?

Mr. Welsh: That is pure speculation and argument, your Honor.

Mr. Allen: This is a witness who for 22 years has been with the refrigerator department and in charge of this very operation.

The Court: Objection overruled.

The Witness: Those evidences wouldn't be definite or final. The thermometer is the final device to record the temperatures. It might be indicative, but your humidity on the date in question and your temperatures would determine the visible evidence. Generally speaking, however, when you open the door of a car you do see the vapor and you do see the frost and you do feel the cold air, if you are close enough to it.

Q. Now, what happens when the Santa Fe notifies a consignee that merchandise is arriving and the consignee does not immediately pick up that merchandise? The Santa Fe doesn't re-ice it, does it?

The Witness: If the bunkers warrant it, they

(Testimony of C. A. Mulvihill.)

are replenished. They inspect the bunkers from the time it leaves San Bernardino up [59] until the time it is unloaded. The bunkers are inspected at destination. The record indicates that the bunkers were 85 per cent full at 8:00 a.m. on the 10th, at the Bay Street Team Track. I don't know of my own knowledge on which track this car was located and I don't know whether this car was available for unloading at that time. My records do not indicate any inspection made after that and I don't know of my own knowledge. My records do not indicate any further inspection.

Q. What happens if it arrives at Bay Street, let us assume, and the consignee does nothing about it? Does the Santa Fe just leave it there to rot?

The Witness: If the bunkers are full on arrival and the consignee doesn't take delivery until they are either full or three-quarters full, he can authorize us to have them replenished and we will replenish them at his request. A consignee is allowed two days time before demurrage sets in. That is true on refrigerator cars as well as on other cars I believe Santa Fe does make an inspection to determine whether or not the car is unloaded but it is not within our department to make the inspection.

Q. Now, what I want to know is just this one question, Mr. Mulvihill, and then I am through. What happens if a consignee has been notified, the consignee does not immediately rush there to pick

(Testimony of C. A. Mulvihill.)

up the merchandise but the car stands there up until the time demurrage sets in?

The Witness: Well, do you mean what happens?

Q. Who ices the car?

The Witness: If the car is three-fourths full when it is placed there after inspection and if additional icing is necessary it has to be on the authorization of the consignee.

Q. In other words, Santa Fe doesn't care?

The Witness: Well, it is in the tariff. That is our tariff regulation. [60]

Q. It just puts the car on the spur track or the Bay Street track and lets it stand there?

Mr. Welsh: Your Honor, this is all out of the point. The tariff is on file with the Interstate Commerce Commission which regulates the carriers and as Mr. Mulvilhill has stated, after the car is delivered it is up to the consignee if he wants ice put in it.

The Witness: I don't know whether a car is deemed delivered when it is put on the track or when it is signed for. That is a legal question which I am unable to answer. I can't answer as to whether it is still under the control of Santa Fe, nor can I answer whether we would permit the seals to be broken until the car is signed for. That is out of my department. I can't answer whether we would permit the seals to be broken until the car is signed for. Santa Fe does make an inspection of the car to determine whether it has been iced while it has been standing at the Bay Street Perishable Team

(Testimony of C. A. Mulvihill.)

Track. I can't say whether an inspection was made in this case. According to the record no such inspection was made. My records do not indicate any such inspection.

Redirect Examination

By the words, "those records" I mean the records which I have in my hand. I don't mean all the records of the railroad company under my control, just merely those in my department, my departmental records.

Recross Examination

By Mr. Allen:

My records do not indicate the condition of the car, nor does it show what happened from the time it left Chicago or Kansas City until it was unloaded in Los Angeles. They indicate a temperature record here at Los Angeles, the amount of ice in the bunkers on arrival, the commodity, and the position of the vents and plugs. It shows the location of the car and the full waybill reference. When I say location of the car, it refers to whether it is at the Bay Street terminal team track or some other place. It does not show on which track it was on. It does not show the specific track. [61]

Mr. Welsh: Plaintiff's Exhibit B for identification is a true and correct copy of a notice sent to Gouley-Burcham Company at 1848 East Vernon Avenue in Los Angeles, notifying Gouley-Burcham Company that Car ERDX 2667 was at the Bay Street Team Track and said notice is dated April

(Testimony of C. A. Mulvihill.)

9, 1948, at 11:00 a.m. with the initials J. S. Do you so stipulate?

Mr. Allen: I will stipulate that if you would call the witness the witness would testify that he made out that notice and that he mailed that notice to the Gouley-Burcham Company.

(Defendant's Exhibit B was then received in evidence.)

Mr. Allen: I am not stipulating, your Honor, that the notice was received. It only goes to the effect that if the witness were called here to testify that he would testify that he mailed it.

The Court: That he mailed this notice. Call your next witness.

TESTIMONY OF ED A. HOMAN

a witness called on behalf of Defendant.

Direct Examination

By Mr. Welsh:

My name is Ed A. Homan. I am the Team Track Clerk at Bay Street in Los Angeles. I was at the Team Track in the month of April, 1946. I have been at the Bay Street a little over 11 years. I have been with Santa Fe since 1926, July 20th. I do have records indicating a car No. ERDX 2667 which arrived at Bay Street on April 10, 1946. The car was on Tract 5. I can show the relative position of that track. At Bay Street we have tracks one, two, three, four and five. I can point to the spot on the track that the car was located. I don't remember

(Testimony of Ed A. Homan.)

how far it was from the west end of the track. The track runs east and west, you see, there at Bay Street, and I have got the location of the track—how deep it was in. It was the sixth car from the east end, about middleways of the track. The car in the [62] position of the sixth car from the east end on Tract 5 is available for unloading. It was available for unloading when it was in that spot. Car ERDX 2667 was spotted at the team track, the sixth car from the east end on Track 5 at 7:00 o'clock on April 10th, 1946. I notified Mrs. Belyea that the car was there. I notified Mrs. Belyea at 8:15 a.m. on the 10th. I spotted the car at 7:00 a.m. I did not call Gouley-Burcham. I called Belyea because they told me a couple of days before in regards to the car and that they were looking for the car, so I called them. Mr. Belyea came down to the track. On the 10th, I would judge, between 8:00 and 8:30, right after I telephoned. He came by the office and we went down to the car. I went to the car with him. That was the first time it was opened. I was the only one with Mr. Belyea when we walked down to the car. Just him and I, just the two of us, we were alone. When we got down to the car the seals were intact. The seal on the north side of the car was 4564 FMC and also on the north side was P-87922 M & St. L. On the south side the seal was number 45631 FMC. Those seals were intact when I went down into the car. Mr. Belyea broke the seals and took them off the door. I was standing there when he did it. Mr. Belyea opened the door. I was not standing right next to him, but I was close by. I

(Testimony of Ed A. Homan.)

was close enough to see into the car. I saw the lading in the car when I looked at it. I saw three or four soft cases in the doorway. I don't know what they call it—kind of wet—moist-like. Three or four were wet and moist. They wasn't mush or nothing like that. I don't know what they call it. They have some kind of name for it. I didn't see any others that were wet or moist. Mr. Belyea did not say anything to me about the condition of the car or the lading. He made no complaint whatsoever. He did not complain to me about the mechanical condition of the car. He did not complain to me about the lading inside of the car. He didn't say anything particular to me, that is, when he first opened the door. Then he closed it up and then he went [63] back and I think he brought the man from Pic'N'Time down with him, and then there was no complaint made to me whatsoever as to the condition or the load or nothing. They did not ask for an inspection. They did not ask for a carrier's agent to inspect or anyone else. My name appears on Defendant's Exhibit A which has been admitted as an exhibit and introduced in evidence. I gave that receipt to Mr. Belyea to sign and he signed it, on the 11th. That was the day after he came down to look at the car. The words "no exceptions reported" were not on the paper when Mr. Belyea signed it. Otherwise it is in the same condition as when he signed it. I wrote the words "no exceptions reported." I wrote it merely as a matter for my own reference. That is all. Car ERDX 2667 was

(Testimony of Ed A. Homan.)

completely unloaded about 6:00 p.m. on the 11th. It is on my delivery order record. The car definitely was unloaded on the day after it was inspected by Mr. Belyea. I looked at the bunkers on Car ERDX 2667 on April 11, 1946. I have a record made in the regular course of business indicating what the capacity was at the time. It was 75 percent full of ice. That was the day on which the car was unloaded. I did not inspect the thermometer Mr. Belyea used to take the temperature of the car. I testified that the car was in the 6th position on Tract 5 on the 10th. The car was not moved before it was completely unloaded. It remained on Tract 5 and was unloaded on Tract 5.

Cross Examination

By Mr. Allen:

The first time that I spoke with Mr. Belyea concerning this car was between 8:00 and 8:30 on the 10th. Mr. Belyea called me on the telephone before the 10th. He was looking for the car. He called me several days before the car arrived. I would say he called me a couple of days before the car arrived, not five days before the car arrived. The first time he called me I told him that I had no [64] record of the car. I told him the car had not yet arrived. Mr. Belyea called me just once. He called me only one time. He asked me if the car was in town, if it had arrived and I told him no. I don't know of his saying anything about the car arriving somewhere in the city and not having been spotted yet; I have no record of it.

(Testimony of Ed A. Homan.)

Q. Let me put it to you this way: If Mr. Belyea testified that you told him that the car had arrived in Los Angeles but had not been spotted as yet, as they were having some question as to the switching of it, would you say he was in error?

Mr. Welsh: Your Honor, this is argumentative. The witness answered his direct question. He said he had no recollection of it.

The Court: He may answer.

The Witness: I have no recollection of him calling me or me telling him that at all and my record doesn't indicate that I told him that. I don't recall it. I handle on an average of 35 cars a day. When a car comes in I personally go to each and every car to see that the seal is broken on each and every car that arrives. We take seal records. The records on the seals are taken before the seals are broken. They are taken when the car is spotted on the track. The seal records are not necessarily taken in the presence of the consignee. We take seal records when the consignee is not there.

Q. Now, do you permit a seal on a car to be broken before the consignee signs for the car?

The Witness: Sometimes the car—they start to work on the car before we get the receipt, the deliver order. Sometimes they come down there to work the car before we get the delivery order.

Q. Well, you don't deliver the car until they sign the receipt first, do you?

The Witness: Oh, sure.

Q. In other words, you deliver the merchandise

(Testimony of Ed A. Homan.)

in the car and then you let them come back two or three days later or a week [65] later and sign the receipt.

The Witness: Oh, no, oh, no.

Mr. Welsh: That is not the witness' testimony, your Honor. He said they let them open the car before they signed a receipt. He is putting a conclusion in the mouth of the witness.

The Court: Yes.

The Witness: It is my practice to permit them to open a car before they sign for it. That is the usual custom and practice. After they open it they sign for the car, they get a delivery order and they come in and sign for it. In this case, I remember going with Mr. Belyea to open the car. I went down with him. I am sure it hadn't been opened prior to that time. I didn't ask Mr. Belyea to sign for the delivery ticket when he opened the car because I didn't have the delivery order. The delivery order hadn't come down from Third Street from where they make them out. I knew that Mr. Belyea had a right to open the car because he had the car number. I just took his word for it. In other words, if you would come up there and say you had a car standing over there and you had the numbers for it and had called previously I would let you open it without signing for it if you had inquired for the car previous to that. I examined the bunkers by opening them up. I climbed up on top. I did not have a flashlight with me. I just looked down into it. There was no light in the bunker—there was ice

(Testimony of Ed A. Homan.)

down there and I just looked down in there. I just glanced down and estimated as to what the car had. There are no markers in there to indicate how much ice is in the bunker. When I say I estimated it at 75% that was my best guess. After Mr. Belyea and I went down to that car and broke the seal, Mr. Belyea looked at the car. He didn't say anything to me about it. He wanted to know, he asked if I had a thermometer. We don't have thermometers down there and told him so.

Q. Is it the ordinary thing for a consignee of a car when he opens a car to say to you, "Let me have a thermometer?" [66]

The Witness: Well, he wanted—he wanted to take the temperature and we didn't have a thermometer.

Q. That isn't what I am asking you. I am asking you if it is the ordinary and customary thing when a consignee opens a car to ask you for a thermometer?

The Witness: Well, some do and some don't.

Q. When do they ask for a thermometer?

A. He asked me when he opened the car.

Q. When does a consignee ask for a thermometer? It is only when there is a question as to the temperature of a car, isn't that so?

Mr. Welsh: The question as now, put, I believe, is argumentative, your Honor.

The Court: What was done in this instance is the question here.

Mr. Allen: Excepting this, your Honor. This

(Testimony of Ed A. Homan.)

witness testified that here is a man who comes to him and asks for a thermometer. We have a right to show by this witness that this asking for a thermometer was unusual, extraordinary and different and the reason why the thermometer was asked for was because there was something wrong with the temperature of that car, and in the ordinary situation where the car appears to be in good order the consignee never asks for a thermometer.

Q. How often does a consignee ask for a thermometer?

The Witness: Not very often.

Q. Very seldom, isn't that so? A consignee does not ask for a thermometer very often. A consignee very seldom asks for a thermometer. The only time that a consignee asks for a thermometer is when there is a question as to the temperature of the car. In this case there was a question about the temperature of the car so he asked for a thermometer. I did not see him put the thermometer in there. He closed the car up and he went and got the thermometer and then he brought the thermometer back. I was not there when he brought [67] it back. I saw three or four cases in the doorway that were kind of wet. By kind of wet I mean they showed dampness. It showed defrosting or whatever they call it. I have been in the business some 22 years, defrosting is what they call it. That is what they call it and it showed evidence of defrosting. I did not see him push his finger into it? To my notion it was not that soft. I didn't see him do it. I did not check

(Testimony of Ed A. Homan.)

to see how many cases were soft, only what I saw in the doorway. I did not get into the car to see whether any other merchandise was soft. All I saw were a few cases that were around the outside. I wouldn't know whether it was three cases or 25 cases, only what I saw of it. I told you I saw just what I saw, all I saw was the cases in front. None of them were removed to see whether any of the cases in the back were soft. He closed the car up. I did not try to determine whether the thermometer used by Mr. Belyea or which he was going to get was accurate. I didn't have a thermometer. When the car was opened and the doors were opened there was no evidence of a fog coming from the car.

Q. Now when you open a car which is thoroughly cool, on a warm day like this was, it is usual for fog to come out of that car, isn't it?

A. Didn't none come out of that one.

Q. But I mean it is usual, is it not?

A. I haven't saw any of it come out of any cars down there. I have had iced cars there before.

A. When a car is thoroughly cool the appearance is that cool air comes out when you open the door. When I opened the door on this car cold air came out. It was as cold as it usually seems when you open the door. It is customary that cars that come in usually have some evidence of defrosting around the doors. [68]

Q. What percentage of the cars that you have

(Testimony of Ed A. Homan.)

watched opened up have evidence of defrosting around the doors on the package that are wet?

A. I said three or four of them that I saw.

Q. Mr. Homan, if you would just listen to the question, that isn't what I am asking you. What I am asking you at this time is how many cars that you opened up the doors, that are properly cooled, do you find evidence of defrosting on the packages and find the packages wet? A. Very few.

Q. So that when a car comes in and there is evidence of defrosting then there is a question about what is happening, isn't there? A. Why, yes.

Redirect Examination

By Mr. Welsh:

I have been looking into bunkers of refrigerator cars for a long time. I will say 20 years. When you look into a bunker you stand up on the top of the car and open up the vents and plug. The light from the outside enters the aperture to some extent. By looking at a car I judge whether it is 75 or 85 or 90 percent full of ice by the distance that the ice is from the top. I have been doing that for about 20 years.

Recross Examination

By Mr. Allen:

I recall the incident concerning this car and Mr. Belyea from my notes because my notes so indicate.

TESTIMONY OF ANTHONY DOMINIS
called as witness on behalf of the Defendant.

Direct Examination

By Mr Welsh:

I am associated with a firm that is in the business of distributing frozen foods. At the present time the firm name is Market Wholesalers—Market Distributors, Incorporated. In April of 1946, the name of the firm was different. It was Pic'N'Time Frozen Foods Company. I was general manager of the firm at that time. Our invoice records show that we received a shipment of frozen shrimp creole from Hamilton Foods in Chicago via Santa Fe Railroad in car ERDX 2667. I don't have any personal records that would indicate it but we did receive 450 cases of shrimp creole at that time. From Hamilton Foods in Car ERDX 2667. I do recall having gone down to the Santa Fe Bay Street team track with Mr. Jack Belyea to look at the lading in that car. That was on or about April 10, 1946. It was the day that the car was actually unloaded and my merchandise, my portion of the car was delivered to me. I believe that was on the 11th but I woudn't swear to it. Mr. Belyea called me and asked me if I would come over and look in this car as he felt that there was some signs of defrosting there. Of course I immediately went down to the Bay Street team track and looked at the merchandise with Mr. Belyea. I got up into it—not into the car, but on the railing of the car there and looked at a few cases of merchandise. Those immediately in the

(Testimony of Anthony Dominis.)

door—there were a few, possibly half a dozen or 10 cases that I looked at that were pretty well defrosted, but beyond that we felt that the merchandise was in sufficiently frozen condition that we could use it and I asked Jack to unload the merchandise and bring it to our warehouse. I don't believe that I got on top of the lading. I would say I stood up so that I could see over the top of the car. I saw about 10 cases that were a little defrosted right immediately in the door—not in back in the car. [70] Those that we examined closely in the door—some of them were really quite badly defrosted. I would say about half a dozen cases—that is a round figure. I told Jack that I didn't want those particular ones but the balance of the load, to get if off the car and bring it over to our warehouse. I did not have Mr. Belyea pick or chose which cartons should be taken to our warehouse, with the exception of telling him not to give me those six or ten. Aside from the few cases right in the immediate doorway the first to come out of the car were the first into the truck and taken over to our place. In other words we gave no instructions as to which cases he should load on the truck for us except not to load those particular six or ten. Some of those cases were hard. Very hard. As hard as they could be.

Cross Examination

By Mr. Allen:

I did not remain at the car until the car was unloaded. I don't know how long I was there after I

(Testimony of Anthony Dominis.)

told Mr. Belyea that I would take some of the merchandise in the car. I think I was there with all of the inspection and everything, over an hour, and then I left. The merchandise was delivered to me by Mr. Belyea. I didn't watch which merchandise Mr. Belyea took. I told Mr. Belyea I didn't want any bad merchandise. I left it to Mr. Belyea to pick the merchandise that he wanted to give me—I mean as to good merchandise. I told him definitely I didn't want those few cases that we looked at there in the door, but the rest of it—how he unloaded it I couldn't say. I wouldn't know whether he handpicked my merchandise or didn't handpick it. At least the cartons which we received were in hard condition. We found only a few cartons that were soft. I recall writing a letter to the Hamilton Foods dated May 2, 1946, which letter was written by Pic'N'Time Frozen Foods and which bears my signature. That letter stated that there were 25 cases which were [71] soft. I see from the letter that my recollection is bad. My recollection would have been better in May of 1946 which was two or three weeks after this situation took place than it is now. I want to change my testimony and say that there were 25 or 30 cases which were bad. I had no complaints from anyone in the trade concerning this merchandise. We put it in storage immediately. The situation as far as storage space at the time was concerned was very critical. It was difficult to get storage space. It would be difficult for me to say how soon after we received the merchandise it was

(Testimony of Anthony Dominis.)

moved or consumed in the regular channels, but offhand I would say that in a period of 45 to 60 days possibly, or maybe longer than that—I don't recall how long.

Q. Was the item scarce at the time?

A. Well, it was the only shrimp creole that we carried or had any access to. I don't recall whether there were any others in the frozen form in the market at the time. It was a new commodity, more or less, in the market. At that time it was readily marketable, and there was a demand for the product.

Redirect Examination

By Mr. Welsh:

The shrimp which we got were in good condition. We had no claims. There was no damaged shrimp in the 450 cases that we received.

TESTIMONY OF JAMES GOODRICH

a witness on behalf of the Defendant.

Direct Examination

By Mr. Welsh:

My name is James Goodrich.

I am now working as a traveling freight claim adjuster for the Santa Fe Railway. I have been with Santa Fe since 1942 and have been working with railroads since 1924. I would say that I have spent [72] roughly about 12 to 15 years in the inspection of perishable commodities in refrigerator cars. I would say that I have inspected thousands

(Testimony of James Goodrich.)

of cars, damaged and undamaged. That inspection would be made pursuant to determining whether or not settlement should be made with the shipper and whether or not there was damage. I have found cars in which there were defrosted cartons or packages near the doorway. I have found cars where there were packages near the doorway which were defrosted, but the other packages were not defrosted. I found that condition many times. I have inspected cars where the packages other than those immediately in the doorway were in excellent condition. I have very much so noticed that to be true with very perishable commodities. As an example, I found a car with a highly perishable commodity, viscerated poultry, which had been defrosted near the doorway, but the rest of the lading was in good order. Viscerated poultry, I mean poultry that is cut up and put in package and shipped in a frozen condition to be sold to retail stores. It is a highly perishable commodity. In connection with that shipment, I opened the doors where the cartons right in the doorway would be completely defrosted and the contents thoroughly spoiled and decomposing, where the balance of the car would be frozen solid, and in edible condition.

Q. And no claims for the balance of the car?

Mr. Allen: Just a second. I object to that because that is going far afield from what we have here—what happened in other cases.

The Court: Objection sustained.

The Witness: I use a thermometer in my work.

(Testimony of James Goodrich.)

Very often I inspect the thermometer and have it tested. With proper care a thermometer should be inspected at least twice a month for accuracy. [73]

Voir Dire Examination

By Mr. Allen:

I have used thermometers on and off in my work for 15 years. I have used alcohol and mercury thermometers. There is a difference between the two. They register Fahrenheit. I keep a thermometer with me when I make inspections. I use a type that is recommended by the engineering department of our refrigerator department—our engineers. Ordinarily I check it twice a month—possibly oftener than that simply by shaking it down. Ordinarily with this type of thermometer you will have very little trouble. It is a type that comes in a metal case. You can break it down to see whether there is any breaking in the vacuum of your mercury or alcohol. In this particular type of thermometer you find very little variance something happens to the thermometer and it goes bad and then, of course, it is valueless. Generally speaking a thermometer will vary only one or two degrees. I would have to see a thermometer for my own opinion on it. I could not say whether generally speaking whether a thermometer used by a company all the time is in pretty good condition excepting as to a possible exception of one or two degrees. I know how to test a thermometer to see whether it is good or not. I test it by shaking it down. That is the only way you test a

(Testimony of James Goodrich.)

thermometer. I am talking about visual examination. That is the only examination I make. If a thermometer goes up or down I would know with my naked eye whether it was recording properly. If I would see a break in my mercury or see the vacuum broken down I would know it wouldn't record perfectly. I would say that any time your vacuum is broken, you will definitely not get an accurate reading. If your vacuum isn't broken and the mercury or alcohol is still solid, you will get an accurate reading all the time. There may be a degree or so of variation. [74]

Redirect Examination

(Resumed)

By Mr. Welsh:

Q. Tell us why it is that a thermometer has to be checked periodically.

Mr. Allen: This witness has not qualified himself as an expert.

The Court: Only from what experience he has had with one. He has had some experience. Objection overruled.

The Witness: A thermometer has to be checked periodically because if the vacuum is broken in your thermometer or if the mercury or alcohol is broken down, you can't get an accurate recording. In other words, the thermometer may record but it may record at any figure—you can never be sure as to how accurate it would be. I have opened a lot of refrigerator cars where the lading was per-

(Testimony of James Goodrich.)

fect, no damage at all. There has been no mist frequently coming out of that car in the month of April. You will always feel the rush of air but so far as a cloud of steam or condensation of moisture I would say no, it isn't the rule.

Cross-Examination

By Mr. Allen:

If a thermometer is placed in a car and the thermometer registers 54 degrees, and then the thermometer is taken out of the car and it is placed underneath a package and it registers 50 degrees I would say that it is recording. The only question would be whether or not off. It could be off one degree or it could be off 20 or 30 degrees. I mean to say that a thermometer will register a difference of 4 degrees and can still be off as much as 20 or 30 degrees. When you open the door of a car thoroughly frozen you feel a rush of cold air.

Q. Now, Mr. Mulvihill testified this morning that when a car is thoroughly frozen and the temperature is such as it was on this day, close to the eighties, or up in the eighties, you usually [75] see a mist come out of the car. When does that situation arise?

A. Well, I would say it arises from a condensation of moisture in there when you get a fog coming out of a car, but I have also opened many cars where you had no—you could see nothing but you could always feel the cold air.

Q. Now if the temperature in a car registers

(Testimony of James Goodrich.)

45 degrees how long would it ordinarily take for the temperature of that car to go up from a point, let us say of 20 or 25 degrees to, let us say, 54 degrees.

A. Well, it loses—a refrigerator car loses its temperature pretty rapidly when the doors are opened. In other words, it equalizes with the outside temperature pretty rapidly, because that is a big opening when both doors are open and while the commodity temperature wouldn't be effected by the same ratio your car temperatures would. They would rise very quickly.

Q. Well, now supposing we have as in this situation, where the door was opened and the doors were immediately shut and they went to get a thermometer, opened the door just to put the themometer in, closed the door and then let it stay there for 15 minutes and then took a reading after that, how long under those circumstances would you say it would take a car to reach a temperature of 54 degrees?

A. Well, I wouldn't want to say in the exact number of minutes. I would say that ordinarily it would take a matter of anything from 20 to 40 minutes.

The Witness: That is my estimate. With the doors open—having been opened for five minutes time and then shut again, that in 30 or 40 minutes the temperature of that car would go from 20 to 54 degrees. [76]

(Testimony of James Goodrich.)

Q. You mean to tell me the doors having been opened for five minutes time and then shut again that in 30 or 40 minutes the temperature of that car would go from 20 to 54 degrees?

Mr. Welsh: That is what the witness stated, your Honor. I don't see the point in this question: "Do you mean to tell me."

Q. (By Mr. Allen): Is that what your testimony is? A. I say that it is possible.

Q. Now, what is the usual condition? How long does it usually take?

Mr. Welsh: Your Honor, that question has been asked and answered. [76A]

Mr. Allen: This man is an expert on refrigerator cars and has been for 20 years.

The Court: I will let him answer it once more. I think he has answered it but you may go ahead.

The Witness: It would depend on a lot of conditions. I have seen cars that were pulled into a storage dock where the doors are opened for three hours while they are taking out a half of a load and still we have recorded temperatures a loss of only possibly 25 to 30 degrees and then again I have seen cars where under almost identical circumstances, they will lose as much as 40 degrees in that much time. I am talking about a door that has been opened for three or four hours. Where the door has been open for five minutes it wouldn't lose that much. It shouldn't lose that much temperature.

(Testimony of James Goodrich.)

Q. That is what I am talking about. In other words, if the temperature was 54 degrees then it must have reached that temperature over some period of time, isn't that so?

A. Yes, if it was 54 degrees when it was opened —if that is an accurate recording it would take time to lose it.

REBUTTAL OF THE PLAINTIFF
TESTIMONY OF JACK BELYEA

Direct Testimony

By Albert H. Allen:

I talked to Mr. Holman on the telephone two or possibly three times prior to the morning the car arrived. Mr. Holman told me that he had no information on the car. They hadn't received any report, but he would notify me on arrival when it was available for unloading.

Q. Now did he tell you that there was some trouble with spotting the car? (No answer.) Something in connection with the switching of it?

A. If I recall, that it was in town, but they weren't able to get it spotted. There was something to that effect. I am positive that I removed the merchandise from that car on the same day that I broke the seal and first opened it. I am positive that I signed the receipt of that car prior to breaking the seal. I am [77] almost certain. At

the time when the door was opened there was no rush of cold air from that car.

Thereupon the plaintiff rested his case and the defendant rested his case and counsel proceeded with the argument.

[Endorsed]: Filed June 14, 1948. Edmund L. Smith, Clerk. [78]

[Endorsed]: No. 11961. United States Circuit Court of Appeals for the Ninth Circuit. Hamilton Foods, Inc., a corporation, Appellant, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Jack Belyea, doing business as Refrigerated Express Company, Appellees, and The Atchison, Topeka and Santa Fe Railway Company, a corporation, Appellant, vs. Hamilton Foods, Inc., a corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed June 25, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11961

HAMILTON FOODS, INC.,
Appellant and Cross-Appellee,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation,
Appellee and Cross-Appellant.

STATEMENT OF POINTS ON APPEAL

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

The following are the points upon which appellant relies on its appeal from the judgment of March 29, 1948:

1. That the Conclusions of Law and Judgment are not supported by the Findings of Fact and are in conflict therewith.

2. That the appellee breached its contract of carriage and the negligence of the appellee in transporting the merchandise shipped by the appellant was the proximate cause of the damage suffered by appellant.

3. That the appellee was negligent in permitting a perishable commodity to remain in a freight car over which it had full control and jurisdiction without icing for sixty-four (64) hours and twenty-five (25) minutes and this neglect and breach of

the contract of carriage was the proximate cause of the damage which appellant suffered.

4. The amount allowed to the appellant for damages is inadequate, unreasonable, arbitrary and is contrary to the Findings of Fact and the weight of the evidence.

5. That is was the duty of the court from the facts as found by the court to enter a judgment for the full damages sustained by appellant which damages were in the sum of Forty-four Hundred Fifty-five Dollars ($4455.00), together with the loss of freight in the sum of Two Hundred Ninety-four and 75/100 Dollars ($294.75).

Dated this 26th day of June, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,
By /s/ ALBERT H. ALLEN,
Attorneys for Appellant and
Cross-Appellee.

[Endorsed]: Filed June 29, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

The following are the points upon which cross-appellant relies on its cross-appeal from the judgment of March 29, 1948:

1. That the Conclusions of Law and Judgment are not supported by the Findings of Fact and are in conflict therewith.

2. That the trial court erred in admitting the evidence which should have been excluded.

3. That appellant failed to make out a prima facie case against this cross-appellant and that the trial court erred in having failed to dismiss the action.

4. That if appellant made out a prima facie case against this cross-appellant then the evidence of the cross-appellant introduced at the trial disclosed that it was not negligent and the burden of going forward with the evidence then shifted to the appellant to prove affirmatively that this cross-appellant was negligent. Appellant failed to prove any affirmative act of negligence against this cross-appellant and the court erred in not entering judgment for this cross-appellant and against appellant.

5. That the Findings of Fact are contrary to the manifest weight of the evidence and contrary to law.

Dated this 30th day of June, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,
By /s/ LOUIS M. WELSH,
Attorneys for Appellee and
Cross-Appellant.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 2, 1948. Paul P. O'Brein, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED PURSUANT TO RULE 19(6)

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

The following are the parts of the record which appellant designates to be printed pursuant to Rule 19(6):

1. Print from the designation of contents of record the entire record as certified by the Clerk of the District Court for the Southern District of California, Central Division, excepting the following items in said designation of contents of record which you are requested to omit and not to print:

(A) Designation No. 6, being the deposition of Alvin H. Mazer taken January 6, 1948, being Plaintiff's Exhibit 3, filed March 9, 1948.

(B) Designation No. 7, being the deposition of Alvin H. Mazer taken March 3, 1948, Plaintiff's Exhibit 3A, filed March 9, 1948.

(C) Designation No. 8, being deposition of Hale C. Burrus taken January 6, 1948, Plaintiff's Exhibit 4, filed March 9, 1948.

(D) Designation No. 9, being deposition of Hale C. Burrus taken March 3, 1948, Plaintiff's Exhibit 4A, filed March 9, 1948.

(E) Designation No. 14, being Plaintiff's Points and Authorities, filed March 15, 1948.

(F) Designation No. 15, being Defendant's Motion for Judgment, filed March 10, 1948.

(G) Designation No. 16, being Reporter's Transcript of Evidence, Vols. 1 and 2.

(H) Designation No. 21, being Statement of Points on Appeal.

2. Print the agreed Narrative Statement of Fact stipulated to by appellant and appellee.

3. Print the Statement of Points on Appeal filed herewith.

Dated this 26th day of June, 1948.

ALBERT H. ALLEN and
HYMAN GOLDMAN,

By /s/ ALBERT H. ALLEN,
Attorneys for Appellants and
Cross-Appellees.

[Endorsed]: Filed June 29, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED PURSUANT TO RULE 19(6)

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

This cross-appellant adopts as its own the designation of parts of record to be printed filed hereto-

fore by appellant and requests that the entire record as certified by the Clerk of the District Court be printed except those portions excluded in appellant's designation.

Dated this 30th day of June, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Appellee and
Cross-Appellant.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 2, 1948. Paul P. O'Brien, Clerk.